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In the Supreme Court

OF THE

United States

OCTOBER TERM 1993

CITY OF SAN DIEGO,
Petitioner,
v.
PHILIP K. PAULSON, HOWARD T. KREISNER
& SOCIETY OF SEPARATIONISTS, INC.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Federal Court of Appeals erred in holding that a privately owned, dedicated historical structure which is located on public property and has religious connotations, violated a state constitutional clause that has not been definitively interpreted by the state courts.

2. Whether the lower federal courts should have abstained from deciding a constitutional public policy issue of paramount importance with far-reaching consequences for all states; where a state constitutional clause (which language differs from the corresponding clause of the Federal Constitution) has not been definitively interpreted by the state court; so that this Court should remand to the district court with orders that the state court should hear the state constitutional issues.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The City of San Diego respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. D) is reported at 990 F.2d 1518 (9th Cir. 1993). The opinion of the district court (App. F) is reported at 782 F. Supp. 1520 (S.D. Cal. 1991).

JURISDICTION

The Court of Appeals for the Ninth Circuit entered its judgment on March 24, 1993. A timely petition for rehear-

ing and suggestion for rehearing *en banc* was denied on March 14, 1994. The district court had jurisdiction over this case pursuant to 28 U.S.C. Section 1331. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. Section 1292(a)(1). This Court's jurisdiction rests upon 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment of the United States Constitution, provides in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. Amend. I

California Constitution Article I, section 4, provides in relevant part: "Free exercise and enjoyment of religion without discrimination or preference are guaranteed.... The Legislature shall make no law respecting an establishment of religion." Article XVI, section 5 provides, "Neither the Legislature ... [n]or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose."

STATEMENT

I.

PROCEEDINGS BELOW

Respondents filed suit in 1989 in the United States District Court for the Southern District of California, alleging that the City of San Diego violated the Establishment Clause of the First Amendment of the United States Constitution, as well as Article I, section 4 and Article XVI, section 5 of the Constitution of the State of California, by allowing a privately-owned permanent structure in the form of a cross to remain on public land. (App. M).

The district court had jurisdiction pursuant to 28 U.S.C. Section 1331. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. Section 1292(a)(1). This Court's jurisdiction rests upon 28 U.S.C. Section 1254(1).

Both parties moved for summary judgment, and on November 13, 1990, District Judge Gordon Thompson, Jr. heard oral argument. On February 5, 1991, Judge Thompson issued a Memorandum Notice (App. G) stating that he would defer his ruling pending the Ninth Circuit's decision in *Hewitt v. Joiner,* 940 F.2d 1561 (9th Cir. 1991), *cert. denied* 112 S. Ct. 969 (1992). The Ninth Circuit issued its ruling in *Hewitt* on July 31, 1991. On December 3, 1991, the court denied Petitioner's motion for summary judgment and granted Respondents' motion, issuing a permanent injunction forbidding the presence of the cross on the public property on which it was located. (App. F). The court granted Petitioner three months within which to comply with the order. (App. F-40).

Petitioner requested a stay of the injunction from the district court and later from the Ninth Circuit. Both were denied. Petitioner next moved the Ninth Circuit for a rehearing *en banc* on the motion for stay. On April 1, 1992, an *en banc* panel of the Ninth Circuit granted Petitioner's request for stay pending appeal. (App. E).

Petitioner then filed an appeal with the Ninth Circuit which heard oral argument on May 5, 1992. On March 23, 1993, the Ninth Circuit upheld the district court's order and held that the presence of the memorial cross on public land violates the California Constitution. (App. D). Petitioner timely filed a motion for rehearing and suggestion for rehearing *en banc* which was denied by the Ninth Circuit on March 14, 1994. (App. B). On May 17, 1994, the district court granted Petitioner's *ex parte* motion for a stay of the December 3, 1991 injunction pending Petition for Certiorari to this Court. (App. A).

II.

THE HISTORY OF THE MT. SOLEDAD CROSS

The Mt. Soledad cross is an historic landmark. (App. K). The present structure was erected in 1953 by a group of private citizens as a memorial to the sacrifices of the armed forces in World Wars I and II and the Korean conflict. It has been owned and maintained by that group of private citizens since then. (App. J). It replaced previous crosses which had been erected on that site since at least 1913. (App. Q-3).

The City of San Diego Historical Site Board has designated the park, the cross, and the fence surrounding it as historical sites. (App. K). A plaque on the fence surrounding the cross indicates it is privately owned and maintained. (App. J)

REASONS FOR GRANTING THE PETITION

I.

THIS COURT SHOULD FIND THE HISTORICAL MT. SOLEDAD CROSS VIOLATES NEITHER THE FEDERAL NOR THE CALIFORNIA CONSTITUTION

The Mt. Soledad Memorial Cross is located in a public park approximately 13.5 miles from San Diego City Hall. (App. I). The distance from the seat of government strengthens the argument for the constitutionality of the cross. In *County of Allegheny v. American Civil Liberties Union,* 492 U.S. 573 (1989), the location of the creche was an important factor in the Court's decision. "Furthermore, the creche sits on the Grand Staircase, the 'main' and 'most beautiful part' of the building that is the seat of county government.... No viewer could reasonably think that it occupies this location without the support and approval of the government." *Id.* at 599-600.

The Mt. Soledad Cross is an historical landmark. San Diego has not exhibited any preference forbidden by the California Constitution nor established religion in violation of the Federal Constitution in allowing the historical cross to remain.

A. The important public policy of historical preservation

Petitioner City of San Diego has a rich cultural history and is active in preserving indices of that history on a content neutral basis; i.e., Temple Beth Israel, Stingaree Bordello, Chinese Benevolent Society Building, U.S. Custom & Court House. (App. L). The Mt. Soledad cross was erected in 1953 by a group of private citizens, businesses, and units of the American Legion and Veterans of Foreign Wars, which formed the Mt. Soledad Memorial Association, Inc. Their express purpose was to create a War Memorial to the veterans of World Wars I and II and the Korean War by erecting a cross to replace the crosses that had previously stood on the same site since at least 1913. That group obtained a permit from the City of San Diego in 1953 to erect the cross. The Memorial Association has owned and maintained the cross continuously since then. (App. J).

The City of San Diego Historical Site Board is responsible for the designation of historical objects and properties throughout the City. (App. L). In 1991, the Historical Site Board, based upon input which pre-dated the instant litigation, designated the cross, the fence surrounding the cross, and the park in which they stand as historical sites. (App. K).

If this Court allows the Ninth Circuit's ruling to stand, the results would indeed be tragic. The federal courts have ordered removal of an historical structure which is over forty years old and which replaced identical structures that had been in place for over eighty years. A federal court should

not make such a decision. Members of this court have commented on a similar fact situation.

> [I]t seems to me a very odd business to strike down a state statute, on the books for almost 40 years without any opportunity for the state courts to dispose of the problem .... For all we know, the state courts would find this statute invalid under the State Constitution, but no one on either side of the case thought to discuss this or exhibit any interest in the subject .... [T]his case is, for me, a classic illustration of one in which we should decline to act until resort to state courts has been exhausted.

Wisconsin v. Constantineau, 400 U.S. 433, 440 (1971) (Burger, C.J., and Blackmun, J., dissenting).

This historic structure could not easily be replaced. If the state courts ruled differently than the Ninth Circuit, this historic monument would have been removed for nought. The abstention doctrines are necessary to avoid such unfortunate results. This Court must not allow these kinds of tragedies to take place, simply because the concept of abstention was not favored by the appellate court.

B. The cross does not violate the California Constitution.

State law in this area is unsettled. The decisions of California courts on establishment clause and "no preference" issues are made on a case-by-case basis. In this case the District Court articulated its own novel four-pronged test to assess "whether the government conduct at issue unconstitutionally expresses a religious preference." (App. F-18). The state courts have not created any such test and consequently the law remains unsettled on this issue.

There are three main California cases that have addressed the "no preference" language. In *Sands v. Morongo Unified*

School District, 53 Cal. 3d 863 (1991), *cert. denied.* 112 S. Ct. 3026 (1992), which concerned a religious invocation at a public high school graduation ceremony, Justice Mosk, concurring, provided some guidance. He stated that "[t]he preference clause seeks to prevent government from giving *any* advantage to religion in California." *Id.* at 911-12. "A benefit conferred on religion will not be considered an unconstitutional preference if it occurs in a forum accessible to a multitude of viewpoints and forms of expression, both religious and secular . . . ." *Id.* at 912 n.4.

In *Fox v. City of Los Angeles,* 22 Cal. 3d 792 (1978), the California Supreme Court invalidated illumination of a cross on Los Angeles City Hall. Interpreting the "no preference" clause, the court commented, "In the California Constitution *there is no requirement that each religion always be represented.* To illuminate only the Latin cross, however, does seem preferential when comparable recognition of other religious symbols is impracticable." (emphasis added). *Id.* at 797. The display or recognition of other symbols *is* practicable in this case and may easily be accommodated if such a request were made by citizens.

In *Okrand v. City of Los Angeles*, 207 Cal. App. 3d 566 (1989), the court held that the display of an unlit menorah in the rotunda of the Los Angeles City Hall did not violate the California Constitution and based its opinion on the Fox court's "no preference" analysis. The feasibility of other structures or displays emphasizes that this cross passes the Fox preference test.

The court in *Hewitt*, discussed *Fox* and *Okrand* and a string of California cases.[1] The court stated that "[w]e must

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[1]*Bennett v. Livermore Unified School Dist.*, 193 Cal. App. 3d 1012 (1987); *Feminist Women's Health Center, Inc. v. Philibosian*, 157 Cal. App. 3d 1076 (1984), *cert. denied*, 470 U.S. 1052 (1985); *Johnson v. Huntington Beach Union High School Dist.*, 68 Cal. App. 3d 1, *cert.*

apply the legal principles articulated by these decisions to the case at bar." *Hewitt* at 1568. The Hewitt court attempted to distill several different decisions on a state constitutional issue into its own "law." The abstention doctrines are meant to curtail such practices. The district court in this case followed *Hewitt's* lead (App. F-14) and went a step further by concocting its own four-pronged test. (App. F-18).

C. The cross does not violate the Federal Constitution.

The Mt. Soledad Cross does not violate the Federal Constitution under any of the tests recently used by this Court .

1. The Lemon test.

The test this Court has utilized most often was articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Under the *Lemon* test, a challenged conduct must (1) have a secular purpose; (2) neither advance nor inhibit religion; and (3) not foster an excessive entanglement with religion.

The cross passes all three prongs. First, it is a dedicated historical monument which was originally erected for the secular purpose of honoring American Armed Forces veterans. "A practice will stumble on the purpose prong 'only if it is motivated wholly by an impermissible purpose.' " *Kreisner v. City of San Diego,* 1 F.3d 775, 782 (9th Cir. 1993) *cert. denied,* 114 S. Ct. 690 (1994) (quoting *Bowen v. Kendrick,* 487 U.S. 589, 602 (1988)). Second, content neutral preservation of an historical structure or object, regardless of its religious or non-religious connotations, neither advances nor inhibits religion. Finally, since the Mt. Soledad Memorial Association still owns and maintains the cross, and the City

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denied, 434 U.S. 877 (1977); *County of Los Angeles v. Hollinger,* 221 Cal. App. 2d (1963); *Evans v. Selma Union High School Dist.,* 193 Cal. 54 (1924).

of San Diego is not involved in maintenance or preservation, there is no government entanglement. If this Court were to decide the issue based on the *Lemon* test, this cross would be constitutional.

2. The "reasonable observer" test.

In *Allegheny,* Justice O'Connor commented on the test she had articulated in her concurrence in *Lynch v. Donnelly,* 465 U.S. 668 (1984). She stated that the " 'history and ubiquity' of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion." *Allegheny,* 492 U.S. at 630 (O'Connor, J. concurring). An objective observer is one acquainted with the text, history, and implementation of the governmental act or statute. *Corporation of Presiding Bishop v. Amos,* 483 U.S. 327, 348 (1987). "This hypothetical observer is informed as well as reasonable; we assume that he or she is familiar with the history of the government practice at issue, as well as with the general contours of the Free Speech Clause and public forum doctrine." *Kreisner* at 784.

In this case, the reasonable informed observer would be made aware by the plaque erected on the fence surrounding the cross and by the media that the cross is privately owned and not sponsored in any manner by The City of San Diego. Therefore, there is no governmental endorsement.

3. The coercion and endorsement tests of *Lee v. Weisman*

The presence of the cross does not violate the coercion and endorsement tests used in *Lee v. Weisman,* 112 S. Ct. 2649 (1992). The City does not coerce anyone to hold Christian beliefs by allowing the historical cross to remain on Mt. Soledad. This case is in no way analogous to the high

school graduation at issue in *Lee*. Here the state has not "compelled attendance and participation in an explicit religious exercise . . . "which the citizen has "no real alternative to avoid." *Id.* at 2661. As stated above, there is no significant state involvement and therefore, no state endorsement.

4. Free Speech issue

The only government action is allowing the structure to stand in a public park, a traditional open forum. This court has defined a traditional public forum as a place, such as a public street or park, which has " 'immemorially been held in trust for the use of the public and, time out of mind, [has] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.' " *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45 (1983) (quoting *Hague v. CIO,* 307 U.S. 496, 515 (1939)).

The City may not deny the Mt. Soledad Memorial Association the right to display its cross on public land on the basis that it could also display it on private property. This Court rejected such an argument in *Schneider v. State,* 308 U.S. 147, 163 (1939) when it stated that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Accord Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 556 (1975).

The cross as symbolic expression is protected as other symbolic speech has been in the past. *U.S. v. Eichman,* 496 U.S. 310 (1990); *Texas v. Johnson,* 491 U.S. 397 (1989); *Metromedia Inc. v. City of San Diego,* 453 U.S. 490 (1981); *Spence v. Washington,* 418 U.S. 405 (1974); *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969); *Stromberg v. California,* 283 U.S. 359 (1931).

The First Amendment free speech argument was not raised below. However, this Court has said that it is not limited it its "power to decide important questions not raised by the parties." *Blonder-Tongue Laboratories Inc. v. University of Illinois Foundation,* 402 U.S. 313, 320 n.6 (1971); *Vance v. Terrazas,* 444 U.S. 252, 258-59 n.5 (1980).

5. Preservation of historical monuments

Governments preserve historical artifacts simply because they are historical, not to espouse any particular creed or religion.[2] An historical approach to the religion clauses, recognizes "the pervasive presence of religion and religious symbols in American life, and caution[s] against 'rigid, absolutist' views of the First Amendment." *Sands,* 53 Cal. 3d 865 at 900, (Lucas, J., concurring). " '[T]he meaning of the [Establishment] Clause is to be determined by reference to historical practices and understandings.... The First Amendment is a rule, not a digest or compendium. A test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause.' " *Id.* at 901 (quoting *Allegheny,* 492 U.S. at 670).

For example, the final resting places of those members of the Armed Services whose remains cannot be identified, or whose records do not contain a religious preference, are marked with a cross.[3] (Apps. H,N,O). It defies logic that

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[2] The State of California also maintains numerous historic treasures currently preserved on public property. An important public policy of The State of California is to foster historic preservation, in several ways, including through public ownership of historic sites. The issue of allowing states to preserve their particular historical objects is so important to The State of California that the Attorney General's office has filed an amicus brief to accompany this Petition for Certiorari.

[3] The American Battle Monuments Commission selected a cross because it is a universally recognized symbol of serenity and passage

this country's monuments and memorials are not protected and could be removed because of any particular segment of history which they portray.

II.

THE LOWER COURTS SHOULD HAVE ABSTAINED FROM HEARING A CASE OF OBVIOUSLY UNSETTLED STATE LAW

A. An intolerable tension between state and federal courts has been created by the Court of Appeals' refusal to order abstention

This request for certiorari is based on the fact that the lower court's decision creates an intolerable tension between state and federal courts. This Court has long granted certiorari for precisely this reason:

> As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts. The Rules indicate that the Court will be persuaded to grant certiorari where a circuit court of appeals "has decided an important question of local law in a way probably in conflict with applicable local decisions."

Ruhlin v. New York Life Ins. Co., 304 U.S. 202, 206 (1938).

Federal courts have held on both sides of the abstention question. It is therefore especially important for this Court to demonstrate its confidence in the ability of state courts to

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from this life, perhaps to a better life. The inscription on these crosses reads: "Here rests in honored glory / a comrade-in-arms known but to God." (App. H)

decide important issues of public policy that directly affect the rights of their citizens. This Court has long emphasized the importance of the independence of state courts:

> A court of equity . . . would seem bound to stay its hand in the public interest where it reasonably appears that the private right will not suffer. It is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy. . . . It has long been accepted practice for the federal courts to relinquish their jurisdiction in favor of the state courts, where its exercise would involve control of or interference with the internal affairs of a domestic corporation of the state.

Pennsylvania v. Williams, 294 U.S. 176, 185 (1934).

As this Court pointed out, federal courts should "restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' [citation omitted] and for the smooth working of the federal judiciary." *Pullman,* 312 U.S. at 501.

> This now well-established procedure is aimed at the avoidance of unnecessary interference by the federal courts with proper and validly administered state concerns, a course so essential to the balanced working of our federal system. To minimize the possibility of such interference a "scrupulous regard for the rightful independence of state governments . . . should at all times actuate the federal courts . . . " In the service of this doctrine, which this Court has applied in many different contexts, no principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have

> been afforded a reasonable opportunity to pass upon them.

Harrison v. N.A.A.C.P., 360 U.S. 167, 176 (1959) (citation omitted). If this Court allows the Ninth Circuit's ruling to stand, it will send a signal that the federal courts may ride roughshod over the rights of states to interpret their constitutions in the way they see fit.

B. Court of Appeals's decision not to order abstention is erroneous because state courts should decide unsettled state issues

1. The importance of states interpreting their own constitutions

This case raises an issue which touches at the very heart of federalism: whether a state should be allowed to interpret a section of its own constitution when the language differs from the corresponding section of the Federal Constitution. Specifically, whether the federal courts should interpret a state constitution's Freedom of Religion clause which is similar to, yet importantly different from, the Religion Clause of the First Amendment of the Federal Constitution, particularly when an historical structure important to the state is involved.

> Indeed, as the highest court of this state, we are independently responsible for safeguarding the rights of our citizens. State courts are, and should be, the first line of defense for individual liberties in the federal system. It is unnecessary to rest our decision on federal authority when the California Constitution alone provides an independent and adequate state constitutional basis on which to decide.

Sands v. Morongo Unified School District, 53 Cal. 3d 863, 906 (1991) (Mosk, J. concurring).

The First Amendment of the Federal Constitution, applicable to the states through the 14th Amendment, states that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . . " The main religion clause of the California Constitution, article I, section 4 states that "Free exercise and enjoyment of religion without discrimination or preference are guaranteed. . . . The Legislature shall make no law respecting an establishment of religion."

Because Respondents brought their claims in federal court, alleging that Petitioner violated both the federal and state constitutions, the parties briefed relevant federal law extensively, but only touched on the California Constitution. The district court decided the case on the California Constitution, but the parties were not given the opportunity to rebrief or reargue based on California law. As this Court has explained, "state high courts have directed parties to file supplemental briefs illuminating possible state constitutional bases of decision when the initial briefings have neglected such issues." *Delaware v. Van Arsdall*, 475 U.S. 673, 702 n.11 (1986) (Stevens, J., dissenting). Short of ordering abstention, the district court should have allowed the parties to brief the state constitutional issue so it could have had the benefit of the cases, evidence, and arguments necessary to make an informed decision based on the California constitution.

California courts have not issued a definitive ruling on the interpretation of the "no preference" clause, nor have they articulated a test to assist in deciding cases arising under that clause. The district court took it upon itself to concoct its own novel four-prong test to measure compliance with that clause. In effect, *because California law is unsettled* on analysis of religion cases, the court created its own law rather than attempting to apply California law. (App. F-17-18).

Even though the district court and the court of appeals cited California cases in their opinions, the courts are not as intimately familiar with those cases as state courts would be. Thus, the federal courts have not done much more than make an educated guess as to how the state courts would rule on this issue. As this Court said in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 499 (1941), "[r]eading the Texas statutes and the Texas decisions as outsiders without special competence in Texas law, we would have little confidence in our independent judgment regarding the application of that law to the present situation."

California law is unsettled on the proper interpretation of the "no preference" clause, and it remains unclear how the California Supreme Court will ultimately interpret this provision. Prior to *Fox*, where the California Supreme Court found that a cross illuminated on city hall violated the California "no preference" clause, California courts had relied on federal law to decide establishment clause issues.[4] Other opinions utilized the "no preference" terminology, but do not expand on a definition of preference.[5] Hence, there

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[4] *See e.g., California Educational Facilities Authority v. Priest*, 12 Cal. 3d 593, 598-605 (1974); *Rowe v. Superior Court*, 15 Cal. App. 4th 1717 (1993); *Duffy v. State Personnel Board*, 232 Cal. App. 3d 1 (1991); *Johnson v. Huntington Beach Union High School Dist.*, 68 Cal. App. 3d 1, *cert. denied*, 434 U.S. 877 (1977); *California School Employees Association v. Sequoia Union High School District*, 67 Cal. App. 3d 157, 160 (1977); *Scott v. Family Ministries*, 65 Cal. App. 3d 492, 506 (1976); *Mandel v. Hodges*, 54 Cal. App. 2d 464, 474 (1976); *Gordon v. Board of Education*, 78 Cal. App. 2d 464, 474 (1947).

[5] *See Lucas Valley Homeowners Assn v. County of Marin*, 233 Cal. App. 3d 130 (1991); *Woodland Hills Homeowners Organization v. Los Angeles Community College Dist.*, 218 Cal. App. 3d 79 (1990). In *Feminist Women's Health Center, Inc. v. Philibosian*, 157 Cal. App. 3d 1076 (1984), *cert. denied*, 470 U.S. 1052 (1985), the court utilized both the U.S. and California Constitutions in deciding the case.

are no clear guidelines to follow in deciding a "no preference" case.

2. *Pullman* abstention should have been ordered in this case

Petitioner's request relies upon the Court's equitable powers, since abstention is equitable in nature. *E.g., Bellotti v. Baird,* 428 U.S. 132, 142 n.10 (1976). It is a "judge-fashioned vehicle for according appropriate deference to the 'respective competence of the state and federal court systems.' " *England v. Louisiana Medical Examiners,* 375 U.S. 411, 415 (1964) (quoting *Louisiana Power & Light Co. v. City of Thibodaux,* 360 U.S. 25, 29 (1959)).

Pullman involved a challenge to an order of the Texas Railroad Commission. There were both federal and state issues involved, but the state law was unclear. The Court held that the state court should first interpret the unsettled state law before the federal court dealt with the federal constitutional questions. *Pullman,* 312 U.S. at 498.

The central idea of the Court's opinion formed the basis of what has become known as the *Pullman* abstention doctrine:

> Had we or they [the lower court] no choice in the matter but to decide what is the law of the state, we should hesitate long before rejecting their forecast of Texas law. But no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination. The last word on the meaning of . . . the Texas Civil Statutes . . . belongs neither to us nor to the district court, but to the supreme court of Texas. In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication.

Id. at 499. *Accord Spector Motor Service v. McLaughlin*, 323 U.S. 101 (1944).

Pullman abstention is proper when a decision on the state claim might preclude the need to reach the federal constitutional claim. *E.g., Bellotti*, 428 U.S. at 147; *Lake Carriers' Asso. v. MacMullan*, 406 U.S. 498, 510 (1972); *Harrison*, 360 U.S. at 176. Previous opinions have stated that the state law must be unclear and subject to an interpretation that would avoid the federal constitutional question for abstention to be ordered. "Where there is no ambiguity in the state statute, the federal court should not abstain but should proceed to decide the federal constitutional claim." *Constantineau*, 400 U.S. at 439.

The state court rulings on the "no preference" clause are far from clear. *Sands v. Morongo Unified School District*, 53 Cal. 3d 863 (1991), *cert. denied*, 112 S. Ct. 3026 (1992), is the seminal "no preference" case in California law. In *Sands*, the justices were undecided whether the practice of a religious invocation at a public high school graduation ceremony violated the California constitution.

> As a result of the various opinions filed in this case, three justices have concluded that the practice violates our state constitution, two have concluded that it does not, and two (myself included) have declined to reach any state constitutional issues. Therefore our judgment does not rest on the state Constitution; any resolution of the state constitutional issues will necessarily await another day.

Id. at 902 (Lucas, C.J., concurring).

"Not only am I unable to discern the majority's reasons, but also I fear its random discourse will confuse rather than guide the bench and bar . . . ." *Fox*, 22 Cal. 3d at 823 (Clark, J., dissenting). California courts, must have the

opportunity to clarify this issue which is unique to its constitution before the federal courts involve themselves.

3. Consequences of the refusal of the lower court to abstain

The Ninth Circuit's refusal to abstain from ruling on an unsettled state constitutional issue dealing with a sensitive area of public policy is erroneous. This Court should therefore grant certiorari and either overturn the Ninth Circuit's erroneous decision or order the case remanded for proceedings in the state court. Certiorari may be granted "[w]hen a United States court of appeals has . . . so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Supreme Court Rule 10.1(a).

It is imperative that this Court instruct the Ninth Circuit as to the proper application of abstention. "On the Supreme Court rests the prime responsibility for the proper functioning of the federal judiciary . . . . 'As the Court of last resort in the federal system, we have supervisory authority and therefore must occasionally perform a pure error correcting function in federal litigation.'" Robert L. Stern et al., *Supreme Court Practice,* 191-92 (7th ed. 1993) (quoting *Florida v. Rodriguez,* 469 U.S. 1, 7 (1984) (Stevens, J., dissenting)).

Since the parties did not expect the district court to decide the case on the California Constitution, abstention was not raised at that time. Petitioner did include a request for abstention in its appeal to the Ninth Circuit. However, because of the sensitive issues of federalism that *Pullman* abstention addresses, this Court may consider it for the first time on appeal. "The fact that the full arguments in favor of abstention may not have been asserted in the District Court

does not bar this Court's consideration of the issue." *Bellotti,* 428 U.S. at 143 n.10.

State constitutions must be respected. As early as 1816, this Court held that "the powers of the states depend upon their own constitutions; and the people of every state had the right to modify and restrain them according to their own views of policy or principle." *Martin v. Hunter's Lessee,* 1 Wheat. (14 U.S.) 304, 325 (1816). "Just as rights under the state constitutions were first in time, they are first also in the logic of constitutional law." *Delaware v. Van Arsdall,* 475 U.S. 673, 701 n.10 (1986) (Stevens, J., dissenting). States are authorized to include language different from the Federal Constitution as long as federally guaranteed rights are protected. "Our reasoning . . . does not *ex proprio vigore* limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." *Pruneyard Shopping Center v. Robins,* 447 U.S. 74, 81 (1980).

If the lower court's ruling is allowed to stand, the important public interest of allowing state courts to determine their own individual constitutions is at risk of being overwhelmed by Federal courts. "It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions." *Michigan v. Long,* 463 U.S. 1032, 1041 (1983). As one commentator noted pragmatically,

> State courts should decide questions of state law because they are sovereign over state law. They are likely to be more sensitive to the purposes underlying state law; they are more familiar with the evolution of state law issues; and they, more than the federal courts, will have to deal with the effects of precedent they create.

Wells, *Preliminary Injunctions and Abstention: Some Problems in Federalism,* 63 Cornell L. Rev. 64, 69 (1977).

Recognizing the importance of allowing state courts to interpret their own laws, the Court has often ordered abstention. "We have found abstention necessary, for example, when the federal action raises difficult questions of state law bearing on important matters of state policy." *Growe v. Emison*, 113 S. Ct. 1075, 1080 (1993).

> Another important reason for abstention is to avoid unwarranted determination of federal constitutional questions. When federal courts interpret state statutes . . . "a constitutional determination is predicated on a reading of that statute that is not binding on state courts and may be discredited at any time — thus essentially rendering the federal-court decision meaningless."

Pennzoil v. Texaco, Inc., 481 U.S. 1, 11 (1987) (citation omitted).

It is not necessary that there be pending state court proceedings. "In some cases, the probability that any federal adjudication would be effectively advisory is so great that this concern alone is sufficient to justify abstention, even if there are no pending state proceedings in which the question could be raised." *Id.* at 11 n.9 (1987).

Abstention is not discretionary. "We have *required* District Courts, and not merely sanctioned an exercise of their discretionary power, to stay their proceedings pending the submission of the state law question to state determination." *Thibodaux*, 360 U.S. at 27 (emphasis added).

Since a federal court decision on state law is binding only on the parties involved in that particular proceeding, a later state court ruling that differs from the federal court's actually "overrules" the federal decision.

> The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court. The resources of equity

> are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication.

Pullman, 312 U.S. at 500.

A grant of certiorari by this Court is appropriate because the outcome of this case will determine not only the rights of the parties involved, but will also inform important public policy. *See Rice v. Sioux City Cemetery,* 349 U.S. 70, 74 (1955). "Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties.' " *N.L.R.B. v. Pittsburgh S.S. Co.,* 340 U.S. 498, 502 (1951) (citation omitted). The decision of this Court whether to grant certiorari will have far-reaching effects on the important states' rights issue and the concept known as "Our Federalism." *Younger v. Harris,* 401 U.S. 37, 44 (1971). "Since the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try cases free from interference by federal courts." *Id.* at 43.

Petitioner's argument was succinctly articulated by this Court: "The Pullman doctrine was based on 'the avoidance of needless friction' between federal pronouncements and state policies. The instant case is the classic case in that tradition, for *here the nub of the whole controversy may be the state constitution.*" *Reetz v. Bozanich,* 397 U.S. 82, 87 (1970) (citation omitted) (emphasis added).

CONCLUSION

This Court has the opportunity to make a definitive statement in support of the preservation of historical artifacts. This Court has a responsibility to send a signal to lower federal courts that when deciding state law issues, federal courts must follow existing state law. They may not create their own "state law."

The district court made up its own law, rather than applying California law when it found the cross unconstitutional. The cross is clearly constitutional under all existing tests of California and Federal constitutional law.

Alternatively, this Court should remand the case so that the district court may direct Respondent into state court. Federal courts must abstain to give state courts the opportunity to interpret their unique constitutional language.

This Court should grant certiorari because the consequences of letting the Ninth Circuit's ruling stand would set dangerous precedent for the federal courts. Both the Federal and state court systems would be adversely affected. In addition, the irreplaceable historical treasures of this country would be at risk of destruction.

Date June 10, 1994

Respectfully submitted,

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City Attorney

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Assistant City Attorney

By: Mary Kay Jackson
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APPENDIX A

APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

PHILIP K. PAULSON, HOWARD T. KREISNER and
SOCIETY OF SEPARATIONISTS, INC.
Plaintiffs,

v.

THE CITY OF SAN DIEGO,
Defendant.

No. 89-0820 GT
EX PARTE MOTION FOR STAY
PENDING APPLICATION FOR
CERTIORARI AND ORDER
FILED MAY 17, 1994

U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

The City of San Diego, defendant herein, by Mary Kay Jackson, its attorney, moves ex parte and applies to the court for a stay of this court's injunction ordered December 3, 1991, pending application to the United States Supreme Court for a writ of certiorari. This motion is based on the attached memorandum of points and authorities.

Good cause exists for granting the stay, as follows: The mandate from the Ninth Circuit Court of Appeals was issued on March 27, 1994 and "spread" by this court on May 9, 1994. There, jurisdiction now rests in this court. Defendant will petition the United States Supreme Court for a writ of certiorari based on defendant's claim that the federal courts should have abstained from deciding this case so that California could have the opportunity to interpret its own Constitution.

DATED: May 13, 1994.

JOHN W. WITT, City Attorney

By /s/ MARY KAY JACKSON
Mary Kay Jackson, Deputy
Attorneys for the Defendant

ORDER

On motion of defendant, City of San Diego, for a stay pending petition to the United States Supreme Court for a Writ of Certiorari, and good cause appearing for the stay having been shown; therefore,

IT IS ORDERED, that the motion be granted and that this court's order requiring removal of the Mt. Soledad Cross be stayed pending defendant's petition to the United States Supreme Court for a Writ of Certiorari. Upon notification from the Clerk of the Supreme Court that defendant has filed a petition for the writ in that Court, the stay shall continue until final disposition by the Supreme Court.

DATED: May 17, 1994

GORDON THOMPSON, JR.
Honorable Gordon Thompson, Jr.
United States District Judge

APPENDIX B

APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES ELLIS,
Plaintiff-Appellees,

VS.

CITY OF LA MESA, ET AL.,
Defendants-Appellants.

PHILIP PAULSON, HOWARD T. KREISNER & SOCIETY OF SEPARATIONISTS, INC.,
Plaintiffs-Appellees,

VS.

THE CITY OF SAN DIEGO,
Defendants-Appellant.

JOHN MURPHY,
Plaintiff-Appellee,

VS.

BRIAN BILBRAY, GEORGE BAILEY, SUSAN GOLDING, LEON WILLIAMS, and JOHN MACDONALD, in their official capacities as members of San Diego County Board of Supervisors and THE COUNTY OF SAN DIEGO,
Defendants-Appellants.

No. 92-55086
D.C. No. CV-90-0135-GT(P)

No. 92-55087
D.C. No. CV-89-0820-GT

No. 92-55093
D.C. No. CV-90-0134-GT

FILED MARCH 14, 1994

Cathy A. Catterson, Clerk
U.S. Court of Appeals

ORDER

Before: TANG, SCHROEDER, and BEEZER, Circuit Judges

The panel has voted to deny the petitions for rehearing and to reject the suggestions for rehearing en banc.

APPENDIX C

APPENDIX

No. 92-55086
D.C. No. CV-90-0135-GT(P)
No. 92-55087
D.C. No. CV-89-0820-GT
No. 92-55093
D.C. No. CV-90-0134-GT

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES ELLIS,
Plaintiff-Appellees,

vs.

CITY OF LA MESA, ET AL.,
Defendants-Appellants.

PHILIP PAULSON, HOWARD T. KREISNER
& SOCIETY OF SEPARATIONISTS, INC.,
Plaintiffs-Appellees,

vs.

THE CITY OF SAN DIEGO,
Defendant-Appellant.

JOHN MURPHY,
Plaintiff-Appellee,

vs.

BRIAN BILBRAY, GEORGE BAILEY, SUSAN GOLDING,
LEON WILLIAMS, and JOHN MACDONALD,
in their official capacities as members of San Diego
County Board of Supervisors and
THE COUNTY OF SAN DIEGO,
Defendants-Appellants.

FILED MARCH 26, 1993
Cathy A. Catterson, Clerk
U.S. Court of Appeals

ORDER

Before: TANG, SCHROEDER, AND BEEZER, Circuit Judges

The opinion filed March 23, 1993 inadvertently omitted the attached separate concurrence.

Ellis v. City of La Mesa, Nos. 92-55086/55087/55093

BEEZER, Circuit Judge, specially concurring:

The writer of the court's opinion deems it necessary to complete the record in order to point out why, in writing for the court, he said nothing about the injunctive relief contained in the district court's summary judgment order.

The district court correctly declared that the permanent presence of the disputed crosses on public property violates the No Preference Clause of the California Constitution. However, San Diego County claims that the Mt. Helix Cross has been transferred to the San Diego Historical Society. Likewise, the City of San Diego claims it is authorized to transfer the Mt. Soledad Cross. The plaintiffs claim that both actions thwart the injuctive relief granted by the district court.

These matters involve enforcement of the injunction and must first be considered by the district court. The district court, however, did not explicitly state the manner in which its injunction was to be enforced.[1] Given their dissatisfaction with the property transfers, one can suppose the plaintiffs will call upon the district court to enforce the injunction by requiring the removal or destruction of the crosses. Destruction of the crosses, however, raises as many issues as it resolves.

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[1] *See ante,* at note 7.

FILED MARCH 23, 1993

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

A. The Mt. Helix Cross Conveyance

The original 1929 Yawkey deed that conveyed the land and the Mt. Helix Cross to the County contained a reversionary clause.[2] No Yawkey heirs were made party to this action in the district court.[3] As noted above, the County claims to have conveyed title to the Mt. Helix Cross and a thirty-foot diameter circle of land beneath it to the San Diego Historical Society. The validity of this conveyance raises a variety of issues involving California property and trust law.

As an initial matter, it is unclear whether the County validly took title of the land in the first place. A municipal corporation cannot ordinarily act as trustee of property to be devoted solely to religious uses. *See* Eugene McQuillin, 10 *The Law of Municipal Corporations,* § 28.31 (3rd ed. 1990). If the County cannot act as trustee under the

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[2]The clause reads as follows:

> AND IT IS FURTHER PROVIDED, That ... should [the County] ... convey, or attempt to convey ... said premises herein conveyed, or any part or parcel thereof, ... to any person, firm association, organization, or corporation, ... then and in that event, the said premises, and the whole thereof, and said fund and/or funds, and the whole thereof, ... shall forthwith revert to, and the title thereof and thereto vest in, and the whole thereof become the property of the trustor herein, his heirs and assigns, and the heirs and assigns of ... MARY YAWKEY WHITE, Deceased, as fully as if these presents had never been executed.

[3]The district court explicitly declined to address the reversionary interest issue. *Murphy,* 782 F. Supp. at 1434 n.36 ("The present lawsuit poses constitutional issues only. It does not provide a sufficient legal or evidentiary basis from which to rule on the sufficiency aznd application of the deed's reversionary clause.").

Mt. Helix conveyance, then either the reversionary clause of the conveyance applies, or the court may prevent the trust from falling by appointing a private trustee. *See id.* at § 28.36.

The reverter clause may no longer be applicable.[4] However, the plaintiffs concede that the Yawkey heirs may have an interest if 1) the court finds the original deed created a charitable trust and 2) the actions taken by the County are determined to have caused such trust to fail.[5]

Although the district court noted that "San Diego County is the trustee" of the "funds left in trust . . . for the purpose of maintaining the Mt. Helix Nature Theatre,"[6] the court did not determine whether the real property itself is held by the County in trust. A number of issues, then, have yet to be resolved. These include determining whether a trust exists, who are the interested parties under that trust, the existence and effect of the reversionary clause, and what effect the County's transfer has on the trust.

The injunction forbids "the permanent presence of each cross on the public property . . . where it appears," and gives

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[4]The County argues that, under the Marketable Record Title Act, Cal. Civil Code §§ 885.010, 885.020 (1982), the power of termination expired unless the a notice of intent to preserve the power to terminate was recorded within five years after the operative date of the Act. *See id.* at §§ 880.030, 885.370. I express no opinion on whether the power to terminate has in fact expired.

[5]Where property is given in trust, but the trust fails for some reason, a resulting trust arises in favor of the grantor or his successors. Witkin, *Summary of California Law*, "Trusts" § 298 (9th ed. 1990); *Restatement (Second) of Trusts* § 335. *See e.g. Evans v. Newton*, 148 S.E. 2d 329 (Ga. 1966), *aff'd sub nom, Evans v. Abney*, 396 U.S. 435 (1970) (where sole purpose for which the trust had been created had become impossible of accomplishment, the charitable trust has been terminated and a resulting trust is implied for the benefit of the grantor or his heirs).

[6]*Murphy*, 782 F. Supp. at 1423 n.8.

the defendants three months to comply with the court's order.[7] It seems to me there are but two ways to comply with this order; the County must either transfer the land or destroy the crosses. Both alternatives implicate the rights of parties not before the court and involve issues undecided by the court. Before the County may transfer the land, it must have title to the land. As noted above, there has been no determination that the initial conveyance to the County was valid in the first place. For similar reasons, the County cannot remove the crosses without potentially violating the property rights of the Heirs of Yawkey who may have legal title to both the land and the cross. If enforcement proceedings are initiated in the district court, questions of California property law and the joinder of interested parties will undoubtedly be at issue.[8]

B. The Mt. Soledad Cross

The voter authorization to transfer ownership of Mt. Soledad Cross has no effect on the court's determination today that the status quo violates the California Constitution. As the opinion points out, a challenge to any future transfer should be brought first before the district court.

A more difficult question is whether all parties who have a legal interest in the Mt. Soledad Cross were before the

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[7]It should be noted that stays have been issued pending the outcome of this appeal. *See Paulson v. City of San Diego*, No. 92-55087 (9th Cir. April 1, 1992) (*en banc*); *Ellis v. City of La Mesa*, No. 92-55086 (9th Cir. Mar. 19, 1992); *Murphy v. Bilbray*, No. 92-55093 (9th Cir. Mar. 19, 1992). These stays will remain in effect until the mandate of this court issues, usually twenty-one days after this opinion is filed. *See* Fed. R. App. P. 41(a).

[8]It bears pointing out that, along with any Yawkey heirs, the interests of the San Diego Historical Society should be considered on remand. As the current holders of colorable title to both the cross and the surrounding land, the Society clearly has an interest in the outcome of this litigation.

district court when it issued its injunction. The City argues that the Mt. Soledad Cross is owned by the Mt. Soledad Memorial Association and that the interests of the Association were not considered by the district court. According to the City, removing the cross would violate the Association's property rights under state and federal law. Plaintiffs argue that the Association has no legal interest in this litigation because the cross was given to the City as a gift.

Under Federal Rule of Civil Procedure 19(a), a just adjudication requires, if feasible, the joinder of those parties that have "a legally cognizable interest in the suit, and [whose] interest will be impaired or impeded by the suit ...." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558-59 (9th Cir. 1990). *See also Shimkus v. Gerten Companies*, 816 F.2d 1318, 1322 (9th Cir. 1987) (the need to consider the interests of third parties, and to do so in the same litigation, favors a decision to require joinder).

In this case, absent a finding by the district court as to who actually owns the cross, it remains unclear whether all "interested parties" were before the district court when it issued its injunction. As with the Mt. Helix Cross, this is a question of state law and may require the joinder of additional interested parties.

When the mandate issues, proceedings to enforce the injunction may be initiated in the district court. The district court, of course, has continuing power to modify or vacate its decree. *See System Fed'n No. 91, Ry. Employes' Dep't, AFL-CIO v. Wright*, 364 U.S. 642, 647 (1961) ("There is . . . no dispute but that a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen."). *See also* 11 Charles Allen Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2961 (1973) (noting the "universally recognized principle that a court has

continuing power to modify or vacate a final decree"). Upon hearing the claims of the parties, the district court will be able to modify, fashion or enforce appropriate equitable relief as the constitutional and property interests of the respective parties may be determined.

APPENDIX D

APPENDIX

No. 92-55086
D.C. No. CV-90-0135-GT(P)

No. 92-55087
D.C. No. CV-89-0820-GT

No. 92-55093
D.C. No. CV-90-0134-GT

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES ELLIS,
Plaintiff-Appellee,

vs.

CITY OF LA MESA, ET AL.,
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PHILIP PAULSON, HOWARD T. KREISNER
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Plaintiffs-Appellees,

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vs.

BRIAN BILBRAY, GEORGE BAILEY, SUSAN GOLDING,
LEON WILLIAMS, and JOHN MACDONALD,
in their official capacities as members of San Diego
County Board of Supervisors and
THE COUNTY OF SAN DIEGO,
Defendants-Appellants.

OPINION

On Appeal from the United States District Court
for the Southern District of California
Gordon Thompson, Jr., District Judge, Presiding

Argued and Submitted May 5, 1992
Submission Withdrawn June 23, 1992
Resubmitted March 16, 1993
Pasadena, California
Filed: March 23, 1993

Before: TANG, SCHROEDER and BEEZER, Circuit Judges.

Opinion by Judge Beezer

BEEZER, Circuit Judge:

We consider three crosses. A 36-foot cross stands atop Mt. Helix in a county park. Another hilltop cross, the 43-foot Mt. Soledad Cross, stands in a city park. The third cross, a depiction of the Mt. Helix Cross, provides the focal point for one of the City of La Mesa's official insignia.

As to each, a lawsuit ensued. After consolidating the cases, the district court heard motions and cross-motions for summary judgment. Relying primarily on Hewitt v. Joyner, 940 F.2d 1561 (9th Cir. 1991), cert. denied, 112 S. Ct. 969 (1992), the court concluded that the crosses' permanent presence on public property violates the No Preference Clause of California's Constitution. The court entered summary judgment in favor of the plaintiffs and issued "a permanent injunction forbidding the permanent presence of each cross on the public property or imprimatur where it currently appears." The government entities timely appealed. We affirm.

I

A. The Mount Helix Cross

In the mid-1920's, Cyrus Carpenter Yawkey and Mary Yawkey White placed a 36-foot Latin cross[1] on the summit of Mount Helix on privately owned land. The cross was erected as a memorial to Mary Carpenter Yawkey. Mt. Helix is one of the highest hills in San Diego County, and the cross is visible from a substantial distance. The cross also serves pilots as a navigational aid.

In 1929, Yawkey conveyed about 3.2 acres, including the cross and an amphitheatre, to San Diego County for uses and purposes specified in the deed. This county park is known as the Mt. Helix Nature Theatre. The conveyance obligates the County to maintain the cross, allows no other monuments to be erected in the park, and requires that "annually, on each and every Easter Sunday forever, religious services of a strictly non-sectarian character and appropriately suitable for commemorating the resurrection of the Lord Jesus Christ, as taught by the Christian churches of the world, shall be held at Sunrise" at the park. Although an Easter sunrise service has been held in the park every year since, the County stresses that it never enforced this provision against an applicant desiring to use the park for an alternative purpose on Easter morning.

The deed also established a trust fund, with the County as trustee, to maintain the cross and to contribute towards the Easter celebration. County employees administer the trust fund. Public funds contribute to the maintenance of the Nature Theatre as a whole.

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[1]A Latin cross is "a figure of a cross having a long upright shaft and a shorter crossbar traversing it above the middle." Webster's New International Dictionary (3d ed. 1981).

The deed further requires that "[t]he Cross on the summit of Mount Helix shall be lighted" on several specific nights each year, including Christmas Eve and the evening before Easter. The County illuminates the cross every night of the year; the trust fund currently pays for the lighting, but county funds had been used for this purpose in the past.

Subsequent to the filing of this case, the County of Board of Supervisors designated the Mt. Helix Nature Theatre and the cross within it as a historical landmark.

B. The Mount Soledad Cross

In 1913, private citizens placed a redwood cross atop Mount Soledad on a 170-acre parcel of land owned by the City of San Diego. The city council dedicated the property as a public park in 1916. Vandals destroyed the redwood cross in 1923; someone replaced it with a wood and stucco cross in 1934. A wind storm destroyed that cross in 1952. Subsequently, the city council granted permission to the Mt. Soledad Memorial Association, a private organization, to place another cross on Mt. Soledad. The Association solicited private contributions and, without municipal funding, supervised and paid for the construction of the current 43-foot concrete cross. On some maps and in the local parlance, it is known as the "Soledad Easter Cross." The Mt. Soledad and Mt. Helix crosses have both provided a backdrop for weddings and baptisms.

The Soledad Cross can be seen from a substantial distance, including a portion of the interstate highway. The district court's summary judgment order states that the cross functions as the most important geodetic marker in San Diego County.

In 1954, at an Easter Sunday religious service, the cross was dedicated as a tribute to veterans of World War I, World War II and the Korean Conflict. The Association maintains the cross and, since its dedication, obtains a

permit each year to conduct a sunrise service on Easter Morning. Although primarily maintained through private funds, the district court found some public funds have been expended to maintain the crosss.[2] Since the filing of this action, veterans groups have held secular remembrance ceremonies at the site.

In its summary judgment order, the district court erroneously stated that the Mt. Soledad Cross, like the Mt. Helix Cross, is illuminated nightly. The parties agree that the Mt. Soledad Cross used to be illuminated, but that the practice ended after vandals repeatedly broke the lights.

On January 30, 1991, after this action was filed, the City of San Diego Historical Site Board designated the cross and the surrounding park as historical sites.

C. The La Mesa Insignia

The City of La Mesa's official insignia depicts a cross atop the highest of several hills, in the center of the design, between two clouds. The artist drew the cross several times larger than it wouild be if drawn to scale. As found by the district court, the insignia was chosen not because it incorporates a religious image, but rather because it depicts the prominent, identifying landmark for the city known as "The Jewel of the Hills."

At the time of this lawsuit, the insignia appeared on police vehicles and on the shoulder patches attached to police, fire fighter, and animal control personnel uniforms, and was used in official literature distributed by the city. The city maintains an official seal which does not depict a cross.

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[2]The district court found that a painting supervisor with the City of San Diego's Building Maintenance Department paid a contractor $1,750.00 to repaint the cross.

II

A. Abstention

Appellants argue that the district court should have exercised abstention pursuant to the doctrine announced in Texas Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). We review the district court's refusal to abstain for an abuse of discretion. Almodovar v. Reiner, 832 F.2d 1138, 1140 (9th Cir. 1987).

Pullman abstention is appropriate where the state's constitution contains a provision unlike any in the federal constitution and state court construction of its unclear or ambiguous clause might make a federal ruling unnecessary. Reetz v. Bozanich, 397 U.S. 82 (1970) (abstention appropriate given that the unique fishing provisions in Alaska Constitution had not been interpreted by Alaska courts).

Appellants argue that the California courts' interpretation of the state constitution's religion provisions remains unclear or, if relatively clear, poised for change. See Pearl Inv. Co. v. City and County of San Francisco, 774 F.2d 1460, 1465 (9th Cir. 1985) ("Uncertainty for purposes of Pullman abstention means that a federal court cannot predict with any confidence how the state's highest court would decide an issue of state law.") (citation omitted), cert. denied, 476 U.S. 1170 (1986).

The legal landscape presented here differs dramatically from that presented in Reetz by Alaska's unique and uninterpreted constitutional provisions regarding fishing rights. Here, we have interpretive caselaw. See Fox v. City of Los Angeles, 587 P.2d 663 (Cal. 1978) (interpreting California Constitution's religion clauses); Okrand v. City of Los Angeles, 254 Cal. Rptr. 913 (Cal.Ct.App. 1989)

(same).[3] Moreover, this is not the first time we have had occasion to interpret the religion clauses of the California Constitution. See Hewitt, supra (discussing California case law regarding the No Preference Clause).

We perceive no "special circumstances" warranting Pullman abstention. Kusper v. Pontikes, 414 U.S. 51, 54 (1973) (citations omitted). Accordingly, we hold that the district court did not abuse its discretion in reaching the merits of these cases.

B. Standing

Standing is a question of law we review de novo. See Bruce v. United States, 759 F.2d 755, 758 (9th Cir. 1985). To have standing to bring this lawsuit in federal court, each plaintiff must "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982) (citations omitted).

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[3]We note that the California Supreme Court has recently addressed the No Preference Clause. In Sands v. Morongo Unified School Dist., 809 F.2d 809 (Cal. 1991), cert. denied, 112 S. Ct. 3026 (1992), the plurality quoted with approval the state Attorney General's observation that "[i]t would be difficult to imagine a more sweeping statement of the principle of government impartiality in the field of religion" than that found in the No Preference Clause. Id. at 820 (citation omitted).

Two members of the court expressly disagreed with the plurality's strict separationist reading of the California Constitution. See id. at 855 (Pannelli, J., dissenting); id. at 863 (Baxter, J., dissenting). Two other members of the court declined to address the California Constitution at all. See id. at 833 (Lucas, C.J., concurring); id. at 842 (Arabian, J., concurring).

We do not read the varied viewpoints expressed in Sands as necessarily portending an interpretive shift, nor do we read Sands as undermining in any way prior state court opinions interpreting the No Preference Clause.

Appellants argue that the plaintiffs fail to meet this standard.

We recently followed other circuits in holding that "when a plaintiff alleges that the government has unconstitutionally aligned itself with religion, standing may be based on finding that the plaintiff has been injured due to his or her not being able to freely use public areas." Hewitt, 940 F.2d at 1564 (citing ACLU of Illinois v. City of St. Charles, 794 F.2d 265 (7th Cir.), cert. denied, 479 U.S. 961 (1986), and ACLU of Georgia v. Rabun County, 698 F.2d 1098 (11th Cir. 1983)).

In ACLU of Illinois, the court found that the plaintiffs had standing where they departed from their usual route to avoid observing a government-owned, lighted cross. 794 F.2d at 267-69. In ACLU of Georgia, the court found that the plaintiffs had standing where they stopped using a state park which included a large illuminated cross. 698 F.2d at 1107-08.

John Murphy, a Catholic San Diego resident and taxpayer, challenges the constitutionality of the Mt. Helix Cross. Murphy attests that he "is offended by the use of public property and the expenditure of public money to display and illuminate the cross on Mt. Helix." Although he "otherwise would visit the [Mt. Helix Nature] Theatre and take out-of-town guests there to enjoy the panoramic view it offers, [he instead] avoids visiting the Theatre because of the large cross."

Philip K. Paulson and Howard T. Kreisner challenge the constitutionality of the Mt. Soledad Cross. Both Paulson and Kreisner are atheists, Vietnam combat veterans, San Diego residents, and taxpayers. They say that they are "deeply offended" by the presence of the cross on Mt. Soledad. Both attest that they would like to take in the spectacular views of San Diego from the park on

Mt. Soledad but avoid doing so because of the cross' dominance of the hilltop.

Paulson and Kreisner are both members of the Society of Separationists, another plaintiff in the action contesting the maintenance of the Mt. Soledad Cross on public property. The Society, which is licensed to do business in California, is "dedicated to the complete and absolute separation of state and religion/church."

James Ellis, an Episcopalian, La Mesa resident, and taxpayer challenges the La Mesa insignia. He maintains that he is "deeply offended" by the expenditure of taxes for the purchase and use of insignia depicting a religious symbol. In order to avoid offending business clients or embarrassing himself, he has declined to invite business clients to his home when, but for the presence of the cross on the insignia, he would have invited them.

In all three of these cases, the district court properly determined that a plaintiff "has been injured due to his or her not being able to freely use public areas." Hewitt, 940 F.2d at 1564. Murphy, Paulson, and Kreisner avoid two public parks in San Diego which they would otherwise use. Ellis curtails his activities to lessen contact with the insignia displayed in his city. The Society of Separationists has standing through its members, co-plaintiffs Paulson and Kreisner. The district court properly held each of the named plaintiffs had standing to bring this case before the court. See Kreisner v. City of San Diego, No. 90-55354, slip op. at 1697 n.1 (9th Cir. March 3, 1993) (plaintiff's standing based on allegation that the challenged display interfered with his right to use public park).

III

We review de novo both the district court's grant of summary judgment, Schlacter-Jones v. General Tel. of Cal.,

936 F.2d 435, 438 (9th Cir. 1991), and its interpretation of state law, Hewitt, 940 F.2d at 1565.

Federal constitutional issues should be avoided when the alternative ground is one of state constitutional law. Id. Thus, although the plaintiffs' suits allege both federal and state constitutional violations, we turn first to the California Constitution.

The California Constitution guarantees the "[f]ree exercise and enjoyment of religion without discrimination or preference." Cal. Const. art. I, 4. This provision is known as the "No Preference" Clause. See Okrand, supra.

In Fox, supra, the California Supreme Court affirmed an order enjoining the thirty-year practice by the City of Los Angeles of illuminating a cross on City Hall during the Christmas holidays, and enjoining the eight-year practice of illuminating the cross on Easter Sundays, both Latin and Eastern Orthodox. The Court considered the "location, size, and visibility of the Los Angeles cross," noting in particular that the cross was illuminated on City Hall and was visible for many miles in many directions. 587 P.2d at 665. The court also pointed out that the illumination of only the Latin cross seemed "preferential when comparable recognition of other religious symbols is impracticable." Id. When viewed in its factual context, the court held the display of the cross violated the No Preference Clause of the California Constitution.

A more recent California case follows Fox's context specific approach. In Okrand, the court considered whether the display of an unlit menorah in the rotunda of the Los Angeles City Hall violated the No Preference Clause. 254 Cal. Rptr. at 921.

The Okrand court identified four circumstances which materially distinguished the menorah from the cross display in Fox. First, the Okrand display included religious symbols

of comparable religious significance to other religions. Id. at 921. Second the menorah was less conspicuous than the lighted, outdoor cross in Fox. Id. Third, a menorah is less religiously symbolic than a Latin cross. Id. at 922. Fourth, the Katowitz Menorah, which was crafted in a distinctive style and had been rescued from the Nazi Holocaust, had a "unique historical background [which rendered it] ... much more a museum piece than a symbol of religious worship." Id. Based on these factors, the Okrand court concluded "that in the context in which it allowed the Katowitz Menorah to be displayed, the city exhibited no preference for the Jewish religion nor promoted it." Id.

We have also had occasion to interpret California's No Preference Clause. In Hewitt, we considered whether San Bernardino County's ownership and maintenance of a public park that contained religious statues violated the California Constitution.

Analyzing California case law, we interpreted Fox and Okrand to stand for the proposition that "not only may a government body not prefer one religion over another, it may not appear to be acting preferentially." 940 F.2d at 1567. We then applied this standard to the historical and physical context surrounding the County park.

San Bernardino county, after taking ownership of the park, had dedicated it "Desert Christ Park," and "printed brochures which identif[ied] each of the statuary scenes by reference to Bible passages." Id. at 1563. This official brochure also described the statuary located on church property adjoining the park, and described these statues as being part of the park. Indeed, the largest of the park's statues, the Last Supper, straddled the property line of the church and the park.

Given these facts, we found "[t]he effect and message of the park is a religious one." Id. at 1568. Viewing the

historical and physical context of the park as a whole, we held the County's ownership of the park "depicts a government-endorsement of the Christian faith" in violation of article I, section 4 of the California constitution. Id. at 1569.

Various factors can be distilled from Fox, Okrand, and Hewitt that are relevant to determining whether, when viewed in its historical and physical context, a given display on public property violates the California Constitution. These factors include 1) the religious significance of the display, 2) the size and visibility of the display, 3) the inclusion of other religious symbols, 4) the historical background of the display, and 5) the proximity of the display to government buildings or religious facilities.

A. The Mt. Helix Cross

1. Public Property

As a threshold consideration, we must determine if the display is on public property. When the district court issued its order in this case, the Mt. Helix Cross stood on land which the Yawkeys had conveyed to the County for the use and benefit of the public.[4] The County argues that the private funds which built and maintain the cross mute any message of governmental involvement; the Yawkey family built the cross on their property, set up a trust fund to be used for its maintenance, and established as a trust condition the establishment of an annual Easter sunrise service.

Had the Yawkeys kept the land as private property, there would be no issue, no question of government involvement. However, they transferred the cross and surrounding land to the County. Pursuant to the conditions of the transfer, the County maintains the park and acts as trustee, responsible for fulfilling the terms of the trust document. As with the

[4]Since this time, the County has conveyed the cross and a small piece of land upon which the cross stands to a private organization.

religious statuary in Hewitt, prior construction with private funds does not negate the message of subsequent maintenance on public land.

The County points out that removing the cross might trigger the reversionary clause in the deed that conveyed the park to the County. Reversionary clauses, however, are hidden from the public view and cannot themselves mitigate an appearance of religious preference. Whatever the effect of our decision today on the ultimate disposition of the cross and the surrounding property, such considerations are irrelevant to determining whether public involvement with the cross, as it stands, violates the No Preference Clause of the California Constitution.

For the same reason, the fact that the cross also serves as a navigational aid, or stands as a prominent landmark and tourist attraction, does nothing to ameliorate a violation of article I, section 4. If anything, such facts underscore the formidable nature of the display and increase the likelihood of an impermissible appearance of religious preference.

2. Religious Significance

The displayed item in this case, as in Fox, is a Latin cross. Appellants argue that the cross has been secularized to the point that it now functions as a general, secular memorial.

The Supreme Court of California has held that the Latin cross carries a greater degree of religious significance than Santa Claus or the Easter Bunny. See Fox, 587 P.2d at 666 ("Easter crosses differ from Easter bunnies, just as Christmas crosses differ from Christmas trees and Santa Claus."). Indeed, the Latin cross "is the preeminent symbol of many Christian religions and represents with relative clarity and simplicity the Christian message of the crucifixion and resurrection of Jesus Christ, a doctrine at the heart of Christianity." Okrand, 254 Cal. Rptr. at 922. This symbolism is evidenced by the cross' use as a backdrop for

Christian celebrations such as baptisms, weddings, and Easter sunrise services.

We find unpersuasive the fact that the cross was built and dedicated as a memorial to a private individual before being conveyed, in trust, nevertheless, to the County. This alone cannot transform the cross into a secular memorial. As the plaintiff's counsel observed, "[t]he people who go to Mt. Helix for annual Easter services are there to commemorate Jesus Christ, not Mary Yawkey."

3. Size and Visibility

The district court found that the religious symbolism of the Mt. Helix Cross is further amplified by its sheer size and visibility. Indeed, the 36-foot cross stands alone at the summit of a high hill and is illuminated nightly. It dominates the area, as did the statues in Hewitt. See Hewitt, 940 F.2d at 1568.

4. Inclusion of Other Religious Symbols

The Mt. Helix Nature Theatre includes no other religious symbols. Indeed, the deed itself prohibits the display of any other religious symbols. Thus, the appearance of preference is not neutralized, as it was in Okrand, by the inclusion of symbols associated with other religions. Okrand, 254 Cal. Rptr. at 918 (display with menorah included, among other objects, a Christmas tree).

The County urges us to look at the entire park system for representation of other religions. The County points specifically to San Diego's first synagogue, Temple Beth Israel, a designated historic site and part of a county park. Although this speaks to an inclusive approach by the park system as a whole, it does nothing to ameliorate the appearance of preference in this particular park. The California courts have not looked beyond the immediate area of the display in determining whether other religions are sufficiently represented. We also decline to do so.

5. Historical Significance

The cross atop Mt. Helix has stood there since the 1920's as a prominent county fixture associated with an annual Easter sunrise service. Article I, section 4, however, requires more longevity; a display's historical significance must be independent of the display's religious content. Even a purely religious symbol may acquire independent historical significance by virtue of its being associated with significant non-religious events. In Okrand, for instance, the Menorah had been saved from the Holocaust and was "much more a museum piece than a symbol of religious worship." Okrand, 254 Cal. Rptr. at 922.

In this case, the County provides no historically significant facts independent of the cross' inherently religious nature. Indeed, it appears the most historically significant aspect of the cross is its long-standing use as the site of annual Easter services. This kind of historical significance simply exacerbates the appearance of governmental preference for a particular religion.

6. Location

The Mt. Helix Cross is not located on an explicit government edifice as were the city hall displays challenged in Fox and Okrand. Moreover, this cross is not associated with neighboring church property, as was the statuary in Hewitt.

The mere fact that the display stands on public property is not enough to call into play the particular locational concerns of Fox and Okrand. In those cases it was the conjunction of religious symbolism with the institutions of government that enhanced the appearance of government endorsement of religion.

No one factor, however, necessarily produces or prevents an appearance of religious preference. The court must look to the particular facts in each case in order to determine if the No Preference Clause has been violated. In this case,

the size and religious significance of the cross, along with the lack of other religious symbols or independent historical significance, creates an appearance of religious preference. This is so despite the cross' distance from city hall.[5]

B. The Mt. Soledad Cross

The Mt. Soledad Cross suffers from the same constitutional infirmities as does the Mt. Helix Cross. Accordingly, we summarize those infirmities while focusing on the ways in which the City of San Diego asserts the cross on this hilltop is different from the one atop Mt. Helix.

As discussed above, the Latin cross is the preeminent symbol of Christianity. As was the case with the Mt. Helix Cross, this symbolism is further evidenced by its use as a backdrop for Christian celebrations such as baptisms, weddings, and Easter sunrise services. As was also the case with the Mt. Helix Cross, the Mt. Soledad Cross stands as the focal point of the park, visible to those looking at the hill from a substantial distance.[6] Finally, we note that the city park which contains the cross does not include comparable

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[5]We note that the district court for Northern California has recently held a cross similar to the one in this case does not violate the No Preference Clause of the California Constitution. See Carpenter v. City and County of San Francisco, 803 F. Supp. 337 (N.D. Cal. 1992). The different result in Carpenter highlights the fact-based contextual inquiry required by these kinds of cases.

In Carpenter, the district court found the cross was located in a remote place, was only partially visible on a clear day, did not dominate the horizon when it could be seen, and could not be seen at all at night. Id. at 341. As we have already noted, the Mt. Helix Cross can be seen from a substantial distance and sits alone atop one of the highest hills in San Diego County. Moreover, unlike the present case, the cross in Carpenter was shown to have independent historical significance. Id. at 348.

[6]In its order, the district court noted that the cross' "commanding presence and nightly illumination at the very summit of Mt. Soledad render it the focal point of the public park in which it stands — so much

symbols of other religions to moderate the cross' sectarian message.

The historic background of this cross differs from the Mt. Helix Cross. Since 1913, a cross has stood on public property in the area where the Mt. Soledad Cross now stands. Built in 1954, the current cross was dedicated to veterans of World Wars I & II and the Korean War. According to the city, the cross has taken on a secular commemorative meaning as a veterans memorial and historical landmark.

The district court considered this argument and concluded that "the evidence indicates that the city's purported commemorative objective is a pretext." The 1913 and 1934 crosses had no memorial associations. The current cross was dedicated on Easter morning in a Christian religious ceremony, even though Memorial Day falls not long after Easter.

The City and the Association challenge the court's identification of this Easter dedication as the only occasion before the filing of this lawsuit at which the cross site has ever been recognized as a war memorial. In support of this claim, the City and the Association have submitted for our consideration documents which suggest the American Legion identified the cross as a war memorial and considered installing a commemorative plaque. The documents also include several newspaper articles, particularly from the 1950's, which refer to the site as a war memorial and indicate that at least two

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so that it may be said, as between the Latin cross and the park, it is not clear which is meant to adorn which." (emphasis added).

All parties agree that the cross is not now illuminated. The city argues that the court's erroneous factual determination formed a core of its ruling, thus mandating reversal and remand. We disagree. The district court elaborated many reasons for the cross' prominence; lighting was just one of them. Lighted or not, the cross has, in the district court's words, a "commanding presence."

ceremonies honoring veterans took place at the site in the decades before this suit was filed. Finally, the articles suggest that the Easter services have included memorial aspects. For example, in past services organizers stood empty mortar shells at either side of the podium and representatives from military organizations took part in the celebration.

We note as an initial matter that these documents were not before the district court and therefore cannot be considered part of the record on appeal. However, even if we were to agree that the cross has always been explicitly recognized and referred to as a war memorial, that would not obviate the appearance of preference.

A sectarian war memorial carries an inherently religious message and creates an appearance of honoring only those servicemen of that particular religion. See Jewish War Veterans of the United States vs. United States, 695 F. Supp. 1, 14-15 (D.D.C. 1987) (court ruling that a cross, "[t]he principal symbol of Christianity, this nation's dominant religion, simply is too laden with religious meaning to be appropriate for a government memorial assertedly free of any religious message."); Greater Houston Chapter of ACLU v. Eckels, 589 F. Supp. 222, 235 (S.D. Tex. 1984) ("[E]ven if one strains to view the [cross] in the context of a war memorial, [its] primary effect is to give the impression that only Christians . . . are being honored."), appeal dismissed, 755 F.2d 425 (5th Cir.), cert. denied, 474 U.S. 980 (1985). But cf. Eugene Sand & Gravel, Inc. v. City of Eugene, 558 F.2d 338, 346 (Or. 1976) (en banc) (display of a large cross in a public park as a veterans war memorial does not violate federal constitution), cert. denied, 434 U.S. 876 (1977).

While not commenting on whether such memorials violate the federal Constitution, we hold that the mere designation of a display as a "war memorial" is not enough to satisfy

the more separationist No Preference Clause of the California Constitution. See Hewitt, 940 F.2d at 567 (noting that religion clauses of California Constitution are read more broadly than their counterparts in the federal Constitution).

C. The La Mesa Insignia

The district court accepted as reasonable the City of La Mesa's explanation that "the cross on the city's insignia is intended to represent a well-known local feature identifiable with La Mesa and, in so doing, to render the city's property and personnel more readily identifiable." We also accept this as the purpose for adoption of the insignia. This secular purpose does not, however, lessen the preference the insignia exhibits for Christianity.

The cross is the focal point of this insignia. It is larger than it would be if drawn to scale, and it occupies the center of the design. Although the insignia also includes clouds and hills, the cross stands out. Whatever the intent, the insignia's design draws particular attention to the cross.

The use of the insignia is particularly troubling. It is attached to uniforms, included on official correspondence, and prominently displayed on police motor vehicles. A design that focuses attention on the cross, when affixed to the uniforms of government officials, creates the appearance of religious preference. We do not hold that any depiction of a cross on an official insignia in California violates the No Preference Clause; we hold only that this particular design violates article I, section 4.

IV

Pursuant to its holding, the district court issued a permanent injunction "forbidding the permanent presence of each cross on the public property or imprimatur where it currently appears." The court further granted the defendants three months "within which to comply with its order." The

court did not state what actions the defendants must take in order to comply with the injunction.[7] Following the issuance of that injunction, various actions have been taken which implicate the present and future status of the Mt. Soledad and Mt. Helix crosses.

On February 24, 1992, the City of San Diego voted to authorize the sale of a 15-foot square parcel of land underneath the Mt. Soledad Cross to the Mt. Soledad Memorial Association for $14,500. On June 2, the voters authorized the sale. This sale, however, has not yet taken place.

On February 25, San Diego County voted to give the San Diego Historical Society the Mt. Helix Cross and a 30-foot diameter parcel of land beneath the cross. This transfer has been effected.

The plaintiffs, in supplemental briefing, argue that both the authorized and completed transfers violate the state and federal constitutions and constitute a bad-faith and illegal end-run around the district court's order. The plaintiffs urge us to resolve the issues. We decline to do so.

These questions relate not to the validity of the injunction before us for review, but to how compliance with that injunction may be effected. Any issues concerning compliance with the injunction should be decided in the first instance by the district court.

AFFIRMED

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[7]The district court did give some indication of what it believed were alternative methods of complying with its judgment. Addressing the relevance of the costs the County will incur should the existence of the Mt. Helix Cross on public property be found unconstitutional, the court held that "the economic expense of removing the cross, of rendering non-public the property on which the cross stands or of otherwise attempting to cure the present infirmity may not bear on the constitutional challenge presently before the court." Murphy v. Bilbray, 782 F. Supp. 1420, 1433-34 (S.D. Cal. 1991).

APPENDIX E

APPENDIX

No. 92-55087

D.C. No. CV-89-0820-GT

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PHILIP K. PAULSON; HOWARD T. KREISNER;
SOCIETY OF SEPARATIONISTS, INC.,
Plaintiffs-Appellees,

-vs-

THE CITY OF SAN DIEGO,
Defendant-Appellant.

FILED APRIL 1, 1992

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

ORDER

Before: WALLACE, Chief Judge, HUG, D.W. NELSON, CANBY, REINHARDT, NOONAN, O'SCANNLAIN, LEAVY, TROTT, and RYMER, and T.G. NELSON Circuit Judges.

We vacate the order of the motions panel, dated February 13, 1992, denying a stay pending appeal, and vacate the order of the merits panel, dated March 19, 1992, granting a stay pending appeal. We grant a stay pending appeal. The appeal shall remain calendared before the merits panel for the week of May 4, 1992. The merits panel now has control of the appeal.

APPENDIX F

APPENDIX

Civ. No. 90-0134 GT
Civ. No. 89-0820 GT
Civ. No. 90-0135 GT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JOHN MURPHY,
Plaintiff,

-vs-

BRIAN BILBRAY, GEORGE BAILEY, SUSAN GOLDING, LEON WILLIAMS and JOHN MACDONALD, in their official capacities as members of San Diego County Board of Supervisors and the COUNTY OF SAN DIEGO,
Defendants.

PHILIP K. PAULSON, HOWARD KREISNER and THE SOCIETY OF SEPARATIONISTS, INC.,
Plaintiffs,

v.

CITY OF SAN DIEGO, CALIFORNIA,
Defendant.

JAMES ELLIS,
Plaintiff,

vs.

CITY OF LA MESA, et al.,
Defendant.

FILED DEC 3 1991

Clerk, U.S. District Court
Southern District of California
Deputy

ORDER

Before the court are 3 consolidated cases, each of which challenges the constitutionality of a local municipality's conduct with respect to the so-called "Latin cross." The Latin cross is a cross the stem of which is longer than its three other arms. One such cross, the Mt. Helix cross, is located in a municipal park in San Diego County. A second, the Mt. Soledad cross, is located in a municipal park in the City of San Diego. A third such cross is depicted on the official insignia of the City of La Mesa, which is located in San Diego County. Plaintiffs contend that the government's acquiescence in the presence and disposition of the first two Latin crosses in public parks and in the depiction of the third Latin cross on a public imprimatur violate the constitutions both of the state of California and of the United States.

This opinion addresses all three challenges. It proceeds first with an exposition of the facts relevant to each of the three challenges, then with a discussion of whether each plaintiff is entitled to sue, and finally with a discussion of the constitutional issues and how they bear on each challenge.

Because these challenges come before the court at the summary judgment stage of litigation, the court is required in its analysis of defendants' motions to interpret all evidence and justifiable inferences in the light most favorable to plaintiffs. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Conversely, the court is required in its analysis of plaintiffs' motions to consider all evidence and justifiable inferences in the light most favorable to defendants. As the material facts in all three cases appear not to be in dispute, the court shall consider them identically

as to both plaintiffs and defendants and shall rule on the parties' motions as a matter of law.[1]

I.

FACTS

A. The Mt. Helix and Mt. Soledad Crosses

The Mt. Soledad and Mt. Helix Latin crosses are substantially similar. Both stand in excess of 35 feet tall.[2] Both are illuminated nightly. Each is erected in, and is a prominent feature of, a publicly-owned park.[3] The parks in which the crosses stand are located atop two of the highest knolls in San Diego County.[4] So situated, each cross can be seen from a substantial distance.[5]

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[1]"It is well-settled that whether a government display violates the first amendment is indeed a question of law." *Harris v. City of Zion*, 927 F.2d 1401, 1402 n.1 (7th Cir. 1991) (citing cases). *See also id.* at 1407-1409.

[2]The Mt. Helix Latin cross is 36 feet tall. It is constructed with concrete.

The Mt. Soledad Latin cross in 43 feet tall. It is constructed with reinforced concrete and weighs approximately 24 tons.

[3]The Mt. Helix Latin cross is located in the Mt. Helix Nature Theatre, a 3-4 acre park which has been owned by the defendant San Diego County since 1929, when it was deeded to the County in trust by Cyrus Carpenter Yawkey.

The Mt. Soledad Latin cross is located in the Mt. Soledad Nature Park, a 170-acre park situated on land which has belonged to the defendant City of San Diego since the nineteenth century. The city council dedicated this property as a public park in 1916.

[4]Mt. Helix is located in the La Mesa area of San Diego County. Mt. Soledad is located in the La Jolla area of the City of San Diego.

[5]The Mt. Helix Latin cross is visible from the town of La Mesa and its vicinity.

Each of the two crosses has stood for a substantial number of years where it currently stands.[6]

Neither cross was erected with public funds,[7] and each is the object of a private fund intended to provide for its maintenance.[8] Nevertheless, it appears that a small amount

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The Mt. Soledad Latin cross is visible from several miles away, including from Interstate 5, a public freeway which passes within ½ mile of Mt. Soledad Nature Park.

[6]The Mt. Helix Latin cross evidently has stood where it now stands since 1925, four years before Cyrus Carpenter Yawkey deeded it, along with the rest of Mt. Helix Nature Theatre, to San Diego County.

The Mt. Soledad Latin cross has stood where it now stands since 1954; however, it is not the first Latin cross to have been erected atop Mt. Soledad. The first known such cross was constructed of redwood and placed on Mt. Soledad by private citizens in 1913. Destroyed by vandalism in 1923, it was replaced by a wood and stucco cross in 1934. The 1934 cross was subsequently destroyed in 1952. The current cross replaced it.

[7]Cyrus Carpenter Yawkey and Mary Yawkey White supervised and paid for the erection of the Mt. Helix Latin cross sometime before 1929, when Mr. Yawkey deeded it, along with the rest of the Mt. Helix Nature Theatre, to San Diego County.

As for the Mt. Soledad Latin cross, the San Diego City Council granted permission in 1952 to the Mt. Soledad Memorial Association to reconstruct a Latin cross on Mt. Soledad. The association then solicited private contributions and, without public funding, supervised and paid for the erection of the Latin cross currently atop Mt. Soledad.

[8]The Mt. Helix Latin cross is maintained with funds left in trust by Cyrus Carpenter Yawkey for the purpose of maintaining the Mt. Helix Nature Theatre. San Diego County is the trustee.

The Mt. Soledad Latin cross is maintained by the Mt. Soledad Memorial Association. The source of funds and labor for the Association's maintenance of the cross is not clear.

The public parks in which both crosses are located are maintained with public (and, in the case of Mt. Helix, some private) funds; only the crosses themselves are privately maintained.

of public funds has also been expended for the maintenance of each.[9]

Roles both religious and secular have been ascribed to each cross. Each has on occasion been used by members of the public for Christian religious purposes.[10] Each cross also

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[9]Proceeds from the Mt. Helix Nature Theatre's trust fund, the corpus of which is $30,000, appear to be sufficient to fund maintenance of the Mr. Helix Latin cross. These funds have also been used in order to maintain other parts of the Theatre. Nevertheless, three circumstances are of note: First, until two years ago San Diego County paid for the electricity used to illuminate the cross. Given the magnitude of the trust fund, this figure may well be easily recompensable by the trust. Second, the terms of the trust require the trustee, San Diego County, to apply trust funds to the annual Easter sunrise service atop Mt. Helix; each year the trust contributes approximately $300. Third, the trust fund is administered by county employees who draw salaries from the County; neither these employees nor the County are compensated by the trust.

As for the Mr. Soledad Latin cross, in 1984 a painting supervisor with the City of San Diego's Building Maintenance Department paid a contractor $1,750.00 to repaint the cross. The supervisor had not been made aware that such maintenance was the responsibility of the Mt. Soledad Memorial Association. The appropriate city departments have since been informed.

[10]The Mt. Helix Latin cross has served as the site of numerous weddings and of an annual Easter Sunday sunrise service. In fact, the deed conveying the entire Mt. Helix Nature Theatre conditions the County's title on the annual holding of an Easter sunrise service "suitable for commemorating the resurrection of the Lord Jesus Christ, as taught by the Christian churches of the world." The terms of that deed also require that the cross be illuminated each year from Christmas Eve until New Year's Eve and on the evening before Easter day (as well as on the evenings of Thanksgiving, Mother's Day, and the grantor's and his sister's birthdays.) The County elects to illuminate the cross every night of the year.

The Mt. Soledad Latin cross was dedicated in a Christian religious ceremony on Easter Sunday, 1954. Since that time, the City of San Diego has granted the Mt. Soledad Memorial Association a permit each year to conduct a sunrise service on Easter morning. No record exists of the Association's ever having submitted an application to conduct

has been dedicated as a memorial to an individual or individuals who have died.[11] In addition, the cross on

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ceremonies on Memorial Day or Veterans Day. Like the Mt. Helix Latin cross, the Mt. Soledad cross has served as the site of numerous weddings. It also has served as the site of several baptisms.

[11]The Mt. Helix Latin cross was originally erected by Cyrus Carpenter Yawkey and Mary Yawkey White to the memory of their deceased mother, Mary Carpenter Yawkey. The dead by which Mr. Yawkey conveyed Mt. Helix Nature Theatre to San Diego County indicates that installed near the cross at that time was a plaque which read as follows:

MOUNT HELIX
NATURE THEATRE
FOR THE INSPIRATION AND USE
OF THE PEOPLE
LOVINGLY DEDICATED
TO THE MEMORY OF THEIR MOTHER
MARY CARPENTER YAWKEY
WHO LOVED THIS MOUNTAIN SUMMIT
AND THE INSPIRING VIEW
BY
CYRUS CARPENTER YAWKEY
AND
MARY YAWKEY WHITE
EASTER 1925

At some time between 1929, when Mr. Yawkey deeded the park to the County, and 1990, when this lawsuit was instituted, vandals destroyed the memorial plaque. The court takes judicial notice that on November 20, 1990, one week after oral argument on this motion, the County replaced the memorial plaque with a replica of the original. *See* County of San Diego's Request for Judicial Notice, filed November 27, 1990.

On April 18, 1954 shortly after it had been erected, the Mt. Soledad Latin cross was dedicated as a tribute to veterans of World War I, World War II and the Korean War. In September 1989, several months after this suit against the City was filed, and thereafter, veterans' groups have conducted Prisoner of War/Missing in Action ceremonies in Mt. Soledad Nature Park.

Mt. Helix serves pilots as a navigational aid, and the cross on Mt. Soledad assists surveyors and seismologists.[12]

While the two crosses clearly are alike in many respects, they also are distinguishable. In particular, it should be noted that whereas the property on which the Mt. Soledad Latin cross stands has been public for as long as the cross has stood there, the property on which the Mt. Helix Latin cross stands did not become public until *after* the cross had been erected on it.[13]

B. The La Mesa Insignia

The Latin cross at issue in the La Mesa case appears in an illustration on the city of La Mesa's official insignia. The illustration depicts several hills below two clouds. The cross is located at the center of the illustration, atop the highest hill and between the two clouds.[14] Plaintiff claims that the image formed by the cross, the hills and the clouds appears to him to be a depiction of Calvary. Defendant, the City of La Mesa, contends that the image is meant to depict Mt. Helix, which is a prominent local landmark. The insignia itself appears on police vehicles, on shoulder patches affixed to the uniforms of police, animal control and fire fighting personnel, and on official literature distributed by the city of La Mesa.

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[12]Mt. Helix is used as a landmark by pilots. It, but not the cross, is indicated on flight maps for navigational purposes.

The cross on Mt. Soledad has been used as a "geodetic marker" for survey and earth-quake monitoring purposes from as early as 1913 until today. It is the most important geodetic marker in San Diego County and is prominently identified in the *Horizontal Control Data* published by the U.S. Department of Commerce Coast and Geodetic Survey (indicating "Easter Cross" on chart). *See* Defendants' Exhibit I-1.

[13]*See* above note 8.

[14]A photocopy of the La Mesa insignia appears in the Appendix to this opinion.

C. The Plaintiffs and the Injuries They Allege

John Murphy, sole plaintiff in the Mt. Helix case, is a Catholic, San Diego County resident and taxpayer who "is offended by the use of public property and the expenditure of public money to display and illuminate the cross on Mt. Helix." Complaint at 2. Although he "otherwise would visit the [Mt. Helix Nature] Theatre and take out-of-town guests there to enjoy the panoramic view it offers, [he instead] avoids visiting the Theatre because of [the presence of] the large cross." *Id.* at 2-3. *See also* Declaration of John Murphy, October 15, 1990 (Plaintiff's Exhibit 1), at 2.

Philip Paulson and Howard Kreisner, plaintiffs in the Mt. Soledad case, both are Viet Nam War combat veterans, avowed atheists and residents and taxpayers of the city of San Diego. Complaint at 2-3, 5-7. Both submit in their complaint that they are "deeply offended" by the presence of the cross on Mt. Soledad. *Id.* at 3. As soldiers they saw companions in arms who adhered to many different faiths fall in combat. *Id.* at 5-7. Having been unable to identify the occurrence of any commemorative activities at the site of the cross, they consider its characterization as a veterans memorial an "outrageous insult." *Id.* at 6-7. Both Paulson and Kreisner would like to visit Mt. Soledad in order to enjoy its spectacular view, but because the cross is there they instead avoid it. *Id.* at 5, 7. As a result of the cross' presence, they feel they "are made to feel like outcasts and second-class citizens in their own home town." *Id.* at 8.

Their co-plaintiff, the Society of Separationists, is a Maryland corporation which is licensed to do business in California and which includes them among its members. *Id.* at 3-4. It is a "nonprofit, nonpolitical, educational organization dedicated to the complete and absolute separation of state and religion/church . . . on behalf of its members and itself." *Id.* at 3.

James Ellis, sole plaintiff in the La Mesa insignia case, is a religious Episcopalian, La Mesa resident and taxpayer who is "deeply offended by the expenditure of taxes for insignias depicting a religious symbol." Complaint at 2-3. *See also* Declaration of James Ellis in Support of Plaintiff's Motion for Summary Judgment, October 15, 1990 (Plaintiff's Exhibit E), at 2. Because the insignia is prominently displayed on city vehicles and on official city mailings to residents, he is unable to avoid contact with it. *Id.* at 3. Mr. Ellis declares that lest the cross on the insignia offend business clients or embarrass himself, he has in the past declined to invite business clients to his home when, but for the presence of the cross on the insignia, he would have invited them. *Id.* at 2. Mr. Ellis is particularly troubled by the way in which the insignia associates Christianity with the police department. He believes that it "symbolically tells people who are Christians that they are welcome or favored . . . and . . . tells people who are not Christians that they are outsiders or less than welcome." *Id.* at 3.

II.

STANDING

Before this court can begin to consider any plaintiff's claim, it must first be satisfied that that plaintiff has standing to have his claim heard. That is, each plaintiff must "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (citations omitted). Plaintiffs may satisfy the injury requirement either by alleging a direct

injury or by proving that they are municipal taxpayers objecting to municipal expenditures.[15]

The Supreme Court has made clear that *psychological* injury suffered by one who observes conduct with which he or she disagrees is insufficient to confer standing. *Valley Forge,* 454 U.S. at 485-87 (intensity of plaintiff's interest in the separation of church and state cannot substitute for requirement of injury in fact). Thus even if the crosses offend plaintiffs, that offense is insufficient to entitle them to maintain suit.

Notwithstanding the insufficiency of psychological injury, the Supreme Court has held that the required injury need not be severe and need not be economic.[16] An example of a non-economic injury which the Supreme Court has held confers standing is the deprivation of a citizen's beneficial use of a public park. *See United States v. Students Challenging Regulatory Agency Procedures (SCRAP),* 412 U.S. 669, 686 (1973) (claimed impediment to plaintiffs' recreational use of natural resources is sufficient to confer standing). The rationale for this holding is succinctly explained in *Allen v. Hickel,* 424 F.2d 944 (D.C. Cir. 1970),

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[15]Unlike federal and state taxpayers, "municipal taxpayers have traditionally been held to have standing to assert objections to municipal expenditures." *Grove v. Mead School Dist.,* 753 F.2d 1528, 1532 (9th Cir. 1985), *cert. denied* 474 U.S. 826 (1985) (doctrine of "taxpayer standing" applicable to federal Establishment Clause challenge).

[16]The Supreme Court has held that the "injury-in-fact" limitation on the jurisprudence requirement of standing should be interpreted so as to "distinguish a person with a direct stake in the outcome of litigation — even though small — from a person with a mere interest in the problem." *See United States v. Students Challenging Regulatory Agency Procedures,* 412 U.S. 669, 698 n.14 (1973) (citing cases) ("identifiable trifle" of injury is sufficient to confer standing) and accompanying text. Accordingly, a showing of slight, non-economic injury is sufficient to confer standing.

a District of Columbia case in which citizens challenged the display of a creche in a public park. In *Allen,*

> [g]overnment counsel put it at argument that if the plaintiffs didn't like to look at the creche, they could avoid walking near the Ellipse while it was occupied by the creche. [The Court of Appeals for the District of Columbia disagreed, however, and held that the plaintiffs were entitled, as members of the public, to enjoy the park land and its devotion to permissible public use; *a government action cannot infringe that right or require them to give it up without access to the court to complain that the action is unconstitutional.*

Allen, 424 F.2d at 947 (emphasis added) (footnotes omitted) (holding that standing existed); [17] *on remand sub nom. Allen v. Morton,* 333 F.Supp. 1088 (D. D.C. 1971) (holding no violation of federal Establishment Clause); *rev'd* 495 F.2d 65 (D.C. Cir. 1973).

Here, plaintiff in the Mt. Helix case and the individual plaintiffs in the Mt. Soledad case allege that the County's and the City's conduct — both in permitting the crosses to stand where they do and, allegedly, in acquiescing in the restrictive covenants associated with the Mt. Helix cross — inhibit the plaintiffs' use of a public park. Since the deprivation of a citizen's beneficial use of a public park is an injury sufficiently direct to confer standing, *see SCRAP,* 412

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[17] *See also American Civil Liberties Union v. Rabun County Chamber of Commerce, Inc.,* 698 F.2d 1098, 1105 (11th Cir. 1983) (per curiam) (standing existed where plaintiffs alleged that, but for presence of large Latin cross, they would use public park); *Valley Forge,* 454 U.S. at 487 n.22 (discussing *School District of Abington Township v. Schempp,* 374 U.S. 203 (1963) (standing existed because law required public school students to "assume special burdens" in order to be excused from mandatory bible reading requirement)); *American Civil Liberties Union v. City of St. Charles,* 794 F.2d 265, 268-269 (7th Cir. 1986), *cert. denied,* 479 U.S. 961 (1986).

U.S. at 686, the standing requirement in the Mt. Helix and Mt. Soledad cases is met.

Plaintiff in the insignia case alleges that the inclusion of a cross on La Mesa's city insignia inhibits him from inviting clients to his home, thereby impeding the way he conducts his livelihood. However small it may be, this impediment to plaintiff's livelihood generates a stake in the disposition of the La Mesa cross which to this court appears no less direct than the stakes upheld in previous establishment clause challenges. *See, e.g., American Civil Liberties Union v. St. Charles (St. Charles),* 794 F.2d 265 at 268-69 (detouring from customary route to avoid religious display is injury sufficient to conver standing), *cert. denied,* 479 U.S. 961 (1986); *Allen,* 424 F.2d at 947 (same).[18] Thus, the standing requirement in the La Mesa case also is met.

The standing requirement's having been met in all three cases, the court must proceed to consider the merits of each.[19]

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[18]In the words of the Seventh Circuit, "[i]t is the willingness of the plaintiffs to incur a tangible, albeit small cost that validates the existence of genuine distress and warrants the invocation of federal jurisdiction." *Harris,* 927 F.2d at 1406. *See also SCRAP,* 412 U.S. at 689 n.14 ("[a]n identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation") (cited in *Harris,* 927 F.2d at 1406).

[19]Since the court finds that at least one plaintiff in each case has standing, and since any one plaintiff's standing in each case will require the court to reach the merits of that case, the court need not address whether the Society of Separationists, co-plaintiff in the Mt. Soledad case, has standing.

In addition, since the court is satisfied that plaintiffs have alleged injuries sufficiently direct to confer standing, it need not assess plaintiffs' alternative claims of taxpayer standing. *See* above note 17.

III.

CONSTITUTIONAL ISSUES

Each of the three cases presently before the court raises important issues under the constitutions both of the State of California and of the United States. Because the Ninth Circuit has held that "federal constitutional issues should be avoided even when the alternative ground is one of state constitutional law," *Carreras v. City of Anaheim*, 768 F.2d 1039, 1042-43 (9th Cir. 1985) (citations omitted), this court turns its attention first to plaintiffs' state constitutional claims.

A review of all three cases reveals that the complaint in each alleges violations of three state constitutional provisions: first, the No Preference Clause of Article I, Section 4; second, the Establishment Clause of Article I, Section 4; and third, the Prohibition on Religious Appropriations Clause of Article XVI, Section 5. *See* Cal. Const. art. I, § 4 and art. XVI, § 5. Because the court holds today that the challenged practices in all three cases violate California's No Preference Clause, it is unnecessary to engage in further analysis under either the California or United States Constitutions.

A. California's No Preference Clause

Article I, Section 4 of the California Constitution provides that:

> Free exercise and enjoyment of religion without discrimination or preference are guaranteed. The liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State. The legislature shall make no law respecting an establishment of religion.

Cal. Constn. art. I, § 4. The first sentence of this section comprises California's so-called No Preference Clause.

The Ninth Circuit, the interpretations of which this court is duty-bound to follow, recently considered the language of the No Preference Clause and the jurisprudence arising from it. *See Hewitt v. Joyner*, 940 F.2d 1561 (9th Cir. 1991). In so doing, the court relied principally on two California cases which, it stated, "defined the state constitutional limits on governmental-sponsored religious displays." *Id.* at 1567. The two cases are *Fox v. City of Los Angeles*, 22 Cal.3d 792 (1978) and *Okrand v. City of Los Angeles*, 207 Cal.App.3d 566 (2d Dist. 1989).

In *Fox*, plaintiffs challenged whether the City of Los Angeles could constitutionally light a cross on city hall during Christmas and Easter. The California Supreme Court, ruling on appeal, acknowledged that "[i]n the California Constitution there is no requirement that each religion always be represented." *Fox*, 22 Cal.3d at 797 (quoted in *Hewitt*, 940 F.2d at 1567). The Court further ruled, however, that "[t]o illuminate only the Latin cross . . . does seem preferential when comparable recognition of religious symbols is impracticable." *Id.* (quoted in *Hewitt*, 940 F.2d at 1567). So ruling, the Court found in favor of plaintiffs and against the city. As stated subsequently by the Second District Court of Appeal, the city's conduct was unconstitutional because the city's "failure or inability to recognize the symbols or holidays of other religions showed a clear act of preference." *Okrand*, 207 Cal.App.3d at 579.

Thereafter, in *Okrand*, the Second District considered the constitutionality of Los Angeles' display of another religious symbol: an unlit menorah, salvaged from the Holocaust and exhibited together with a Christmas tree in the city hall rotunda. Ruling on the constitutionality of the menorah display, the court held that "in the context in which it allowed the Katowitz Menorah to be displayed, the city exhibited no preference for the Jewish religion . . ." *Id.* at 579.

In so holding, the court expressly identified four circumstances which materially distinguished the display in *Okrand* from that in *Fox*: First, the *Okrand* display's menorah was less religiously symbolic than the Latin cross displayed in *Fox*.[20] Second, the *Okrand* menorah was considerably less conspicuous than the *Fox* cross.[21] Third, the *Okrand* display included "comparable recognition of

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[20]The *Okrand* court stated that

> [t]he menorah . . . differs in degree from the Latin cross in terms of its significance as a symbol of religion. The cross is the preeminent symbol of many Christian religions and represents with relative clarity and simplicity the Christian message of the crucifixion and resurrection of Jesus Christ, a doctrine at the heart of Christianity. The menorah's significance to Judaism, on the other hand, is much less direct. Chanukah is not perceived as the most important Jewish holiday. It does not celebrate any central Jewish religious principle but rather celebrates a historical event which has provident overtones. Certainly the menorah is a central part of the traditional celebration of the holiday, but the candelabrum itself does not readily focus attention on a religious doctrine in the manner of the cross (i.e., the salvation of mankind through the atonement and resurrection of Christ), nor does it visually portray a central tenet of religion as does a nativity scene (i.e., the divine and virgin birth of Christ in mortality).

Okrand, 207 Cal.App.3d at 579-580. *Cf. Hewitt*, 940 F.2d at 1568 (discussing *Okrand*).

[21]The *Okrand* court held that the

> display of the menorah at city hall may be distinguished from the lighted cross displayed in *Fox* by size and visibleness. The lighted cross in *Fox* was "visible for many miles in many directions, and can be and is viewed by persons driving the freeways who do not see it in the context of other Christmas decorations and who may not participate in such celebrations at all . . ." [quoting *Fox*.] The Katowitz Menorah, on the other hand, stood unlit in a corner of the rotunda that was also occupied by a decorated Christmas tree.

Okrand, 207 Cal.App.3d at 579. *Cf. Hewitt*, 940 F.2d at 1568 (discussing *Okrand*).

other religious symbols."[22] *See Okrand*, 207 Cal.App.3d at 579. Fourth and finally, the *Okrand* menorah's "unique historical background . . . [rendered it] more a museum piece than a symbol of religious worship."[23] *See id.* at 580. On the basis of these four factors,

> [t]he *Okrand* court found the display did not exhibit a preference for one religion . . . [and t]herefore . . . concluded that the city's display of the unlit menorah was permissible under . . . the California . . . Constitution[].

Hewitt, 940 F.2d at 1568.

Relying principally on the opinions in *Fox* and *Okrand*, the Ninth Circuit concluded in *Hewitt* that the No Preference Clause of the California Constitution flatly prohibits a governmental body from even appearing to prefer one religion over another or others. *See Hewitt*, 940 F.2d at 1567 ("not only may a governmental body not prefer one religion over another, it also may not *appear* to be acting preferentially"). *See also id.* at 1566-1567 (quoting *Sands v. Morongo Unified School Dist.*, 281 Cal. Rptr. 34 (Sup.Ct. 1991) (Kennard, J.) (plurality opinion) and citing *Okrand*).

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[22]According to the Second District,

> there was no lack of "comparable recognition of other religious symbols." [citing *Fox*]. And, in our view, display of the menorah showed no more preference for Judaism than display of the Christmas tree showed for Christianity.

Okrand, 207 Cal.App.3d at 579. *Cf. Hewitt*, 940 F.2d at 1568 (discussing *Okrand*).

[23]"Finally," held the court in *Okrand*,

> the unlit Katowitz Menorah, with its unique historical background, was much more a musuem piece than a symbol of religious worship.

Okrand, 207 Cal.App.3d at 580. *Cf. Hewitt*, 940 F.2d at 1568 (discussing *Okrand*).

Having so construed the No Preference Clause, the *Hewitt* court then addressed itself to the controversy before it, in which plaintiffs challenged whether San Bernardino County could constitutionally own and maintain a public park which contained religious statuary depicting New Testament scenes. The court ruled that "[b]ecause of their dominance of the landscape, the statues are more symbols of worship than museum pieces." *Id.* at 1568. On this and other grounds,[24] the court held the County's ownership and maintenance of the park unconstitutional.

Distilling the opinions in *Hewitt*, *Okrand*, and *Fox* into a set of guiding principles, this court concludes that according to California law, a government body is conducting itself unconstitutionally whenever it so much as appears to be preferring one religion over another or others. *See Hewitt*, 940 F.2d at 1567; above p.16. Further, although no single circumstance may act as a litmus test for assessing the appearance of preference in a government display, nevertheless certain circumstances are highly probative. Among those circumstances are:

1. The religious significance of the item(s) challenged in the display;

2. The size and visibility of the display and of the item(s) in it;

3. Whether the display includes any comparably significant item(s) of other religions; and

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[24]The court relied on two other grounds in arriving at its holding: First, the deed conveying the park to the County required that the statuary not be altered. Therefore, "[u]nlike a museum or a library which is free to add or subtract from its collection, the Antone Martin Memorail Park is a static collection of Christian symbols displayed and maintained by the government." *Hewitt*, 940 F.2d at 1568. Second, "[t]he allegedly great efforts taken by the County to ensure that a religious message was not perceived by the public [we]re unsuccessful." *Id.* at 1569.

4. The historical background of the item(s) included in the display.

Accordingly, the court must inquire into these, and other probative circumstances, in assessing whether the government conduct at issue in each of the present three cases unconstitutionally expresses a religious preference.

B. The Mt. Helix Cross

The Ninth Circuit's construction of the No Preference Clause subjects public entities to a demanding standard of constitutional compliance. So demanding is that standard that, even embracing the religiously neutral intentions alleged by the County,[25] this court still is unable to hold other than that the County's conduct with respect to the Mt. Helix cross impermissibly violates the California Constitution.

1. The Okrand factors

Inquiring into the four distinguishing factors discussed by the *Okrand* court and subsequently focused upon by the Ninth Circuit in *Hewitt*, *see* above pages 14-16, 17 and *Hewitt*, 940 F.2d at 1568, the court notes that not one of these factors is satisfied by the conduct challenged in the present case.

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[25]The presence of a secular purpose clearly would be probative in an inquiry under the United States Constitution because a secular purpose satisfies in part the federal constitutional standard regulating governments' religious involvement. *See Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971). Further, the presence of such a purpose would be probative in an inquiry conducted pursuant to the California Constitution's Establishment Clause. Under California's No Preference Clause, however, the presence of a secular purpose is irrelevant. *See Hewitt*, 940 F.2d 1569 ("the no preference clause is not satisfied by a secular purpose").

a. Religious significance of the Latin cross

Beginning with the first of the four *Okrand* factors, the court finds that the Latin cross is a powerful religious symbol. It is true, as evidenced by the varying sentiments of the plaintiffs in the instant three actions, that different individuals may identify with the Latin cross in different ways and in differing degrees. That the Latin cross is the principal symbol, and a universally recognized symbol, of Christianity, however, is beyond dispute. For regardless of how one may choose to characterize the Latin cross, the fact remains that

> [t]he cross is the preeminent symbol of many Christian religions and represents with relative clarity and simplicity the Christian message of the crucifixion and resurrection of Jesus Christ, a doctrine at the heart of Christianity.

Okrand, 207 Cal.App.3d at 579-580.[26]

Not only is the cross a profoundly religious symbol; it also is an exceedingly powerful symbol. As the United States Supreme Court once observed,

> [s]ymbolism is a primitive but effective way of communicating ideas. The use of an emblem ... to

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[26]*See West Virginia State Bd. of Education v. Barnette*, 319 U.S. 624, 632 (1943) ("the church speaks through the cross"); *Harris*, slip op. at 4 ("[t]here ... can be no doubt that a Latin cross is the principal and unmistakable symbol of Christianity as practiced in this country today"); *St. Charles*, 794 F.2d at 271 (Latin cross "is, indeed, the principal symbol of Christianity as practiced in this country today"); *Rabun*, 698 F.2d at 1103 ("Latin cross is a universally recognized symbol of Christianity"); *Mendelson v. City of St. Cloud*, 719 F.Supp. 1065, 1069 (M.D. Fla. 1989) ("[t]he Latin cross is unmistakably a universal symbol of Christianity"); *Hewitt v. Joyner*, 705 F.Supp. 1443, 1449 (C.D. Cal. 1989) (Latin cross "epitomize[s] Christian faith ... is the pre-eminent symbol of many Christian religions and clearly represents the key Christian concept of the Crucifixion and Resurrection

> symbolize some system, idea, [or] institution . . . is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to [symbols] . . . [T]he church speaks through the Cross, the Crucifix, the altar and shrine . . . Symbols of State often convey political ideas just as religious symbols come to convey theological ones.

West Virginia Board of Education v. Barnette, 319 U.S. 624, 632 (1943) (striking down compulsory participation of public school students in flag salutes) (quoted in *Greater Houston Chapter of the American Civil Liberties Union v. Eckels* (*Eckels*), 589 F.Supp. 222, 235 (S.D. Tex. 1984), *appeal dismissed*, 755 F.2d 426 (5th Cir. 1985), *reh'g denied en banc*, 763 F.2d 180 (5th Cir. 1985), *cert. denied*, 474 U.S. 980 (1985)).

So powerful is the image of the cross on Mt. Helix, for example, that *amicus curiae,* who resides with his wife in a home with a view of the cross, declares:

> The memorial cross on top of Mt. Helix has been a source of inspiration and comfort to us both in times of adversity, and has played, and continues to play, a

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of Christ"), *rev'd* 940 F.2d 1561 (9th Cir. 1991); *Jewish War Veterans v. United States*, 695 F.Supp. 3, 13 (D. Col. 1988) ("the Latin cross . . . is a readily identifiable symbol of Christianity"); *Libin v. Town of Greenwich*, 625 F.Supp. 393, 399 (D. Conn. 1985) ("the cross is primarily a religious symbol . . . [and a]ny secondary meaning as a symbol of peace appears to be derived from the teachings of Christ as set forth in the tenets of the Christian religions to which the cross is sacred"); *Greater Houston Chapter of the American Civil Liberties Union v. Eckels*, 589 F.Supp. 222, 234 (S.D. Tex. 1984) ("[t]hat the cross . . . [is] the primary symbol [ ] for Christianity . . . is beyond question"), *appeal dismissed*, 755 F.2d 426 (5th Cir. 1985), *reh'g denied en banc*, 763 F.2d 180 (5th Cir. 1985), *cert. denied*, 474 U.S. 980 (1985).

> personal and instrumental part in the daily practice of our faith.
>
> [W]here the cross removed [our residence] would have a diminished appeal to other members of the Christian faith who would be potential purchasers.

Declaration of Arlington Ray Robbins in Support of Motion to Intervene, at pp. 3-4.

Further evidence of the Mt. Helix Latin cross' powerful religious symbolism may be gleaned from a catalogue of "what the site has been used for since the [cross was] constructed . . . Easter sunrise services and . . . wedding[s]." *Eckels*, 598 F.Supp. at 235.[27] *See* above note 11. Activities such as these not only reflect, but also augment, the religious significance of the cross on Mt. Helix. *Cf. County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter (Allegheny)*, 492 U.S. 573, 599 (1989).[28]

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[27]The situtation before this court is not unlike that presented in *Eckels*, where three Latin crosses and a Star of David erected in a public park were similarly used for religious purposes. The court in *Eckels* held that

> [t]he symbols have had the effect of converting this site into an open air church on those occasions. There is nothing remotely secular about church worship, and the religious overtones of most weddings are undeniable.

Eckels, 598 F.Supp. at 235. As plaintiff's counsel in the present case rather pointedly observes, "[t]he people who go to Mt. Helix for annual Easter services are there to commemorate Jesus Christ, not Mary Yawkey." Plaintiff's Opposition at 6.

[28]The United States Supreme Court held in *Allegheny* that "because some . . . carols performed at the site of [a] creche [display] were religious in nature, those carols were more likely to augment the religious quality of the scene than to secularize it." *Allegheny*, 492 U.S. at 599.

b. Size and visibility of the display

The powerful religious symbolism of the Mt. Helix Latin cross is further amplified by its sheer size and visibility. Standing alone at the very summit of Mt. Helix, illuminated every evening, and discernible from a considerable distance, Mt. Helix's Latin cross is *the* focal point of the public park in which it is located.[29] Further, the cross' commanding skyline presence effectively precludes the County from being able to successfully dissociate itself from the cross' symbolism. After all, the cross is so prominent that even were the County to install a plaque or sign expressing a message of non-preference, still the vast majority of people who see the cross — those who view it from afar — would not receive the benefit of knowing what the plaque said.[30]

c. Comparable symbols of other religions

Were the Nature Threatre to include symbols of other religions, comparable in significance to the Latin cross and similar in stature to its embodiment atop Mt. Helix, then any impermissible appearance of religious preference would be diminished, if not eliminated. By way of example, the City of Los Angeles successfully neutralized the potential appearance of preference in it display of the Katowitz menorah by recognizing along with the menorah a

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[29]It is true that the religious significance of the deed's requiring the cross to be illuminated on certain Christian holidays, *see* above n.10, is diminished by the cross' being illuminated every evening of the year. This creative resolution of one infirmity, however, merely amplifies another. For in permitting the cross to be rendered visible day *and* night the year around, the County is doubling the amount of time that its residents and visitors are exposed to the cross' powerful religious symbolism. *Cf. Allegheny* , 492 U.S. at 599; above n.28.

[30]*Cf. Allegheny*, 492 U.S. at 599 ("The effect of the creche on those who viewed it when the choirs were not singing — the vast majority of the time — cannot be negated by the presence of the choir program.").

Christmas tree together with other non-Jewish religious and secular symbols. Viewed in light of the No Preference Clause line of opinions which precede this case, however, the government conduct presently at issue appears to be considerably more akin to the government conduct struck down in *Fox* and *Hewitt* than to that upheld in *Okrand*. Both *Fox* and *Hewitt* implicated displays of a symbol or symbols associated with only one religion. Similarly, San Diego's present conduct in displaying the cross atop Mt. Helix is not neutralized by recognition of the symbols or rituals of other religions.[31]

d. Historical background

As for the fourth and final factor identified in *Okrand* — the historical backgound of the item(s) included in the display — the court notes that dating as far back as it does and recognized as widely as it is, the cross atop Mt. Helix no doubt has acquired local historic significance. The historic significance of the cross on Mt. Helix is of a different quality, however, than that of displays such as the menorah salvaged from the Holocaust and upheld in *Okrand*. The *Okrand* display's significance lay in the unique set of global historical circumstances — world war, totalitarianism and

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[31]Of greater constitutional concern than the County's acquiescence in the presence of the Latin cross on Mt. Helix would be its acquiescense in the covenants requiring that the cross remain lit on certain religiously significant days of the year and, even more troublingly, that the park's use be restricted to a particular sectarian activity — the Easter sunrise service — every year at a certain time. With respect to the second covenant in particular, if the government's implicit guarantee that it would subordinate the rights of some individuals to those of other individuals based solely on those individuals' religious convictions would not generate the appearance of religious preference, then this court is at a loss to identify what could. Nevertheless, in the absence of any evidence that the County has ever enforced the Easter service covenant against an applicant desiring to use the park for an alternative purpose on Easter morning, that covenant is not ripe for review.

genocide — from which the Katowitz menorah emerged. By contrast, the Mt. Helix cross' significance lies primarily in its prominence, its longevity and its association with the annual Easter sunrise service. Whereas in *Okrand* the item displayed sprang from the historical circumstances which rendered it significant, in the present situation it is the historical circumstances which spring from the item displayed. The historical significance of the cross on Mt. Helix, in other words, derives primarily from long use. As the Supreme Court has made emphatically clear, however, "no one acquires a vested or protected right in violation of the Constitution by long use." *Walz v. Tax Commission,* 397 U.S. 664, 678 (1970); *Committee for Public Education v. Nyquist,* 413 U.S. 756, 792 (1973) (quoting and distinguishing *Walz*).[32]

e. Location

In addition to the four factors identified as probative in the *Okrand* opinion, the court identifies a fifth: location. Insofar as its location, the Mt. Helix cross is less susceptible to the danger of exhibiting preference than were the *Fox* cross and the *Okrand* menorah. The cross in *Fox* was emblazoned across the face of as explicit a symbol of public life and governance as Los Angeles City Hall. The menorah in *Okrand,* though less conspicuous, also was located at City Hall. The public property with which the Mt. Helix cross is associated — a park, by contrast — does not symbolize government authority. Accordingly insofar as its location, the Mt. Helix cross compares favorably to the symbols considered in *Fox* and *Okrand.*

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[32]*See also Marsh v. Chambers,* 463 U.S. 783, 790 (1983) ("standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees"); *Allegheny,* 492 U.S. at 603 ("history cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed"); *Rabun,* 698 F.2d at 1111; *Harris,* 927 F.2d at 1414-1415.

Still, however, the court notes that the public environment in which the Mt. Helix cross is displayed is not dissimilar to that in which the statuary struck down in *Hewitt* also were displayed. True, the presence of a church beside the park in *Hewitt* rendered the statuary display more preferential in appearance than has the Nature Threatre rendered the cross on Mt. Helix. Nevertheless, it is noteworthy that a display need not be as conspicuously associated with the government as were the displays in *Fox* and *Okrand* in order to run afoul of California's No Preference Clause.[33]

Considered together, the five circumstances discussed above characterize the prominent government display of a solitary symbol laden with religious meaning, the sectarian significance of which is moderated neither by the display's history nor by its remoteness from symbols of governance.

2. Non-factors

In addition to the five circumstances discussed above, the court notes that additional qualities characterize the cross on Mt. Helix and the County's conduct with respect to it. Among these are (a) the nature and extent of public expressions both in support of and in opposition to the cross, (b) the economics of requiring that the County remove the cross or divest itself of the property on which the cross now stands, and (c) the reversionary consequences for Mt. Helix

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[33] *Amicus curiae* argues that an individual observing religiously symbolic grave markers in a public cemetary could not reasonably attribute to the government the expressions of religious faith implicit in those markers. The court agrees; however, the same individual observing a 36 foot tall, religiously symbolic, permanent monument centrally placed and illuminated in a public park commanding a view of the locale could reasonably draw the opposite conclusion. So, too, could the thousands of additional reasonable observers who daily pass within view of such an edifice. For this reason, the public cemetery is distinguishable from the situation presently before the court.

Nature Theatre should the County in fact be required to part company with the cross.

Notwithstanding the relevance of these matters to the history and future disposition of the Mt. Helix cross, however, the court may not consider them in ruling on the constitutionality of the County's relationship with the cross.

a. Silence of religious minorities

First, the court notes that the cross stood, unchallenged, on public property for a period of sixty-one years before this lawsuit was filed and, moreover, that the record in this case reveals few public expressions of opposition to the cross' presence. Ironically, the individual challenging the presence and disposition of the cross identifies himself as a Catholic and, therefore, as someone for whom the cross presumably is a symbol of reverence. In contrast to the plaintiff's expression of concern at the public presence and disposition of the symbol of his faith are the expressions of concern which individuals of other faiths have voiced at the prospect of that symbol's *removal*. Says Rabbi Michael P. Sternfield: "I do not know of anyone in the organized Jewish community who wants to make an issue of these crosses." *See* Letter to the Editor written by Rabbi Michael P. Sternfield and published in *The San Diego Union*.[34]

His letter notwithstanding, however, Rabbi Sternfield cannot be said to speak for the entire community of non-adherents to Christianity. The record reveals the existence of other individuals — adherents and non-adherents: Catholics, Jews, Atheists and others — who feel injured by

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[34]The court takes judicial notice of Rabbi Sternfield's letter. *See* Post-Hearing Request for Judicial Notice filed in No. 90-0134 by Amicus Curiae on December 11, 1991. Further, the court also takes judicial notice of Rabbi Sternfield's September 18, 1991 unpublished Yom Kippur address, in which Rabbi Sternfield expressed his opposition to the challenges presently before the court.

the presence of one or more of the Latin crosses involved in this, and its companion, cases.[35] That neither these individuals nor others expressed concern before now cannot be interpreted as an indication that the County's conduct with respect to the cross does not exhibit preference. In *Fox*, which presented a situation not dissimilar in this regard to the situation presently before the court,

> the City of Los Angeles contended that because the cross-lighting had occurred for 30 years without citizen complaint, obviously the public did not perceive any preference on the part of the city. The court rejected this argument; [however,] acknowledging that the silence of religious minorities may signal something quite different from disinterest.

Hewitt, 940 F.2d at 1567 (citation omitted) (citing *Fox*, 22 Cal.3d at 797).

b. Cost

A second circumstance, with respect to which the court is aware, but which the court must not consider in ruling on the constitutionality of the County's acquiescence in the presence of the cross, is the matter of thrift. The court acknowledges that, quite apart from whatever range of personal and religious meanings have been ascribed to the Mt. Helix Latin cross over time, the cross also has evolved a separate, secular importance, for example, as a navigational aid for pilots. Therefore, it is not implausible that the assistance which the cross provides to pilots and navigators is one reason why the County permits the cross to stand.

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[35]By way of example, the court notes plaintiffs in these actions, representatives of the Anti-Defamation League and other private citizens. *See, e.g.*, Plaintiffs' Exhibits F and G in Nc. 90-0135, documents which are matters of public record and of which the court takes judicial notice with respect to each of the three cases presently before it.

Had the Latin cross not already been present when the County acquired Mt. Helix, then perhaps the County would have chosen to erect a different edifice in order to assist pilots.

The cross' having already been built, however, it may be argued that the County should not have to incur the superfluous expense and inconvenience of razing the cross and replacing it with a secular edifice dedicated to the very same end. Moreover, it could be argued to be a violation of the public trust were the County, as beneficiary of Cyrus Yawkey's largesse, to destroy, let deteriorate or otherwise squandor a useful asset, such as the Latin cross, then present on the deeded land.

The argument is cogent; however, it can be no more persuasive in this and the accompanying two cases than have been similar such convenience-, efficiency- and expense-oriented arguments which the Supreme Court traditionally has rejected in vindication of constitutional rights. *See, e.g., Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (due process); *Stanley v. Illinois*, 405 U.S. 645, 656 (1972) (same); *Reed v. Reed*, 404 U.S. 71, 76 (1971) (equal protection); *Carrington v. Rash*, 380 U.S. 89, 96 (1965) (equal protection, right to vote). Quite simply, mere inconvenience cannot be permitted to trump constitutional strictures such as those regulating the relationship between religion and the state. The court, therefore, holds that the economic expense of removing the cross, of rendering non-public the property on which the cross stands or of otherwise attempting to cure the present infirmity may not bear on the constitutional challenge presently before the court.

c. Reversionary consequences

Finally, the reversionary consequences of the cross' removal also may not inform the court's decision.

The court entertains no doubt that the County's conduct in permitting the cross to stand atop Mt. Helix is motivated considerably, if not principally, by the desire to preserve Mt. Helix Nature Theatre as a public park. After all, the reversionary clause in the deed conveying Mt. Helix Nature Theatre appears to suggest that preservation of the cross atop Mt. Helix is necessary in order to preserve the Nature Theatre as a public park.[36] Moreover, equally necessary (according to the terms of the deed) in order for the park to remain in the public domain is adherence to the covenants requiring that an Easter service occur annually at the Theatre and that the cross be illuminated during specified Christian holidays.[37] If the County fails to perform a single one of these covenants, then it risks the park property's reversion to the heirs of Cyrus Yawkey. Thus it is fair to infer that the preservation of a public park is a principal factor motivating the County to permit the cross to stand, to restrict the Theatre's use annually on Easter Sunday and to permit the cross to be illuminated on certain nights of the year.

Whatever the reason may be for San Diego County's compliance with the restrictive covenants, however, it is axiomatic that restrictive covenants and potential possibilities of reverter may not compromise guarantees so fundamental as to be reposed in the Constitution either of the United States or of any constituent state. By way of example, if the Yawkey deed included a convenant requiring

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[36]The reversionary consequences of the deed conveying Mt. Helix Nature Theatre to San Diego County are not properly before the court. The present lawsuit poses constitutional issues only. It does not provide a sufficient legal or evidentiary basis from which to rule on the sufficiency and application of the deed's reversionary clause.

[37]Among the evenings of the year on which the deed expressly requires that the cross on Mt. Helix be lit are Christmas Eve and the night before Easter. *See* above n.10.

that the Mt. Helix Nature Theatre revert to a private interest if a white person used the property, then the County's conduct in excluding whites from the park would satisfy its contractual covenant yet violate the guarantees of equal protection found in both the California and United States constitutions. *See* Cal. Const. art. I, § 7 (equal protection); U.S. Const. amend. XIV, § 1 (same). Accordingly, the County's conduct would be unconstitutional as a matter of law, and the County would be required to stop excluding whites, regardless of the attendant reversionary consequences. In that case, as in this, to permit the reversionary consequences of covenant noncompliance to influence the court's ruling on a constitutional issue would be to render subordinate to private contract the fundamental, *constitutional* directives which this court is sworn to uphold.

Just as the court may not suspend the directives of the Equal Protection Clause in vindication of public space, so may it not suspend the directives of the No Preference Clause in pursuit of the same end. Before the court is a consitutional challenge, not an action for declaratory judgment or contractual breach. Accordingly, only the constitutional issue is ripe for adjudication, and the reversionary consequences of today's decision must be left to be adjudicated another day. *See Evans v. Newton*, 382 U.S. 296 (1966) (whether designating public park for exclusive use by white people satisfies the Fourteenth Amendment is an issue to be considered separately from the reversionary consequences of extending park use to non-whites).

The court now turns to Civ. No. 89-0820 GT, challenging the inclusion of a Latin cross on the insignia of the city of La Mesa.

C. The La Mesa Insignia

The City of La Mesa contends that including the Latin cross on its official insignia is intended to help the public identify the insignia's bearers with the city of La Mesa. Mt. Helix is a prominent local landmark commonly associated with La Mesa, and the Latin cross atop Mt. Helix is its unique distinguishing feature.

As the city's counsel stated in oral argument,

> The logo clearly depicts Mount Helix, and I think that depiction is certainly logical. The city of La Mesa has been known for many, many years as "the Jewel of the Hills." Well, the Hill is Mount Helix. There is a high school named for Mt. Helix; La Mesa residents get their water from the Helix Water District; there are a wide variety of establishments in the city of La Mesa that bear the name Mount Helix and Helix . . . So there is a very firm, long standing tie between the city of La Mesa and Mount Helix.

Given the geographic and historic nexus between Mt. Helix, the Latin cross atop it and the city of La Mesa, it is clear that the cross' inclusion on the city's official insignia would help a knowledgeable public to quickly, easily and correctly identify local police officers, squad cars, fire fighters, animal control officers and other city employees and vehicles. Accordingly, the court accepts as reasonable counsel's representation that inclusion of the cross on the city's insignia is intended to represent a well-known local feature identifiable with La Mesa and, in so doing, to render the City's property and personnel more readily identifiable.

Were this particular feature not so closely and universally identifiable with a particular religion, then its presence on a government insignia might not disturb the No Preference Clause. Here, however, the feature depicted on what La Mesa has chosen as the symbol of its very authority to

govern is the profoundly religiously symbolic Latin cross. Moreover, it is the Mt. Helix Latin cross, which this court already has found contributes to an appearance of government religious preference sufficient to render unconstitutional its presence in a public park. *See* above pp. 18-31. Under such circumstances, the court cannot find other than that La Mesa's incorporation of the Mt. Helix Latin cross in its official insignia communicates a message of government preference for religion in general, and for certain sects in particular, thereby violating California's proscription against the appearance of preference.

The danger implicit in permitting the incorporation of a religious symbol within a symbol of the authority to govern has been noted by the Tenth Circuit in *Freidman v. Board of County Commissioners of Bernalillo*, a case involving the incorporation of the Latin cross on a city seal. In *Freidman*, the court expressed concern lest

> [a] person approached by officers leaving a patrol car emblazoned with this seal could reasonably assume that the officers were Christian police, and that the organization they represented identified itself with the Christian God. A follower of any non-Christian religion might well question the officers' ability to provide even handed treatment. A citizen with no strong religious conviction might conclude that secular benefit could be obtained by becoming a Christian.

Freidman, 781 F.2d 782 (10th Cir. 1985) (en banc), *cert. denied*, 476 U.S. 1169 (1986) (holding district court's order upholding county seal "clearly erroneous").[38] As the

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[38] *See also Harris*, 927 F.2d at 1412. *Harris* involved a challenge to a seal within which the Latin cross was no more prominent than several secular images. The court in *Harris* held that

> [l]ike the seat of county government in . . . *Allegheny* . . . the corporate seal of a municipality is plainly under government control

Freidman court further concluded, the government's inclusion of a Latin cross in its imprimatur would have "threatening connotations" for, among others, Lebanese Moslems, Northern Irish Protestants, Native Americans and Jews. 781 F.2d at 781-82.[39] *Cf. Mendelson v. City of St. Cloud*, 719 F.Supp. 1065 (M.D. Fla. 1989).[40]

> and is a clear symbol of government power. In fact the Rolling Meadows seal presents a more compelling case for finding the challenged display unconstitutional. The City's seal is a permanent statement that is viewed year-round, while the creche is displayed only seasonally amidst the secular celebration of Christmas. The Latin cross on the seal, then, brings together church and state in a manner that suggests their alliance perhaps even more ardently than the unconstitutional creche display[ ] in . . . *Allegheny* . . . The seal of Rolling Meadows acts as the City's imprimatur for official correspondence, property and business. The conspicuous depiction of the pre-eminent symbol of a particular faith on that seal conveys a message of approval that is simply inconsistent with the first amendment.

Id. (citation omitted) (holding that inclusion of cross on government seal violated federal Establishment Clause).

[39]The cross incorporated in the seal before the *Friedman* court presented an appearance of preference more egregious than that presented by the cross incorporated in La Mesa's insignia: The *Friedman* cross was more conspicuous and was accompanied by the Latin phrase, "Con Esta Vencemos" ("With This We Conquer"). *See Friedman*, 781 F.2d 782. The egregiousness of one incursion on the Constitution, however, cannot excuse the smaller magnitude of a second, even inadvertent incursion. *Compare Friedman and Harris*, 927 F.2d at 1415 (reversing lower court's finding that inclusion of non-religious symbols in city seal sufficiently neutralized any religious message that could be conveyed by inclusion of cross).

[40]*Mendelson* involved an illuminated Latin cross erected atop a water tower in the city of St. Cloud. Emblazoned across the middle of the tower was the slogan "Welcome to St. Cloud" and a replica of the city seal. The court concluded from this display that "[t]hose who observe the cross atop the water tower can only presume that the City of St. Cloud has abandoned any pretense of religious neutrality and has

Clearly, the Latin cross is not a benign symbol, and the perception that it is favored could well deter non-adherents from living in, visiting, or serving as employees of the City of La Mesa. The court, therefore, holds that La Mesa's inclusion of the Latin cross on its insignia is susceptible of the appearance of government preference and, therefore, is in violation of the No Preference Clause.

The court now turns its attention to Civ. No. 90-0135 GT and the cross atop Mt. Soledad.

D. The Mt. Soledad Cross

The Latin cross displayed atop Mt. Soledad is subject to the same constitutional infirmities to which the Latin cross displayed atop Mt. Helix is subject. Like its Mt. Helix counterpart, the Mt. Soledad cross is a powerful sectarian symbol, the religious effect of which is evidenced by the uses to which it has been put as the backdrop for Christian sectarian events, such as weddings, baptisms and Easter sunrise services. Its commanding presence and nightly illumination at the very summit of Mt. Soledad render it the focal point of the public park in which it stands — so much so that it may be said, as between the Latin cross and the park, it is not clear which is meant to adorn which. No comparable symbols of other religions are present to moderate the cross' sectarian message. Nor is the cross' sectarian significance mitigated by its history. In fact, to the contrary, history belies and reinforces the sectarian significance of the Latin cross displayed atop Mt. Soledad.

The City contends that it permits the cross to stand in order to commemorate the lives and sacrifices of fallen soldiers. "It is obvious," asserts counsel for the City, "that a cross used as a war memorial has lost its religious

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wholeheartedly endorsed the Christian religion." *Id.* at 1071 (citing cases).

symbolization and has become resymbolized to take on a new commemorative secular meaning." Defendant's Memorandum of Points and Authorities in Support of Motion for Summary Judgment, November 13, 1990, at 11. Obvious though this may seem to counsel for the City, however, it is equally obvious to this court that "even if one strains to view the [cross] in the context of a war memorial, [its] primary effect is to give the impression that only Christians . . . are being honored." *Eckels*, 589 F.Supp. at 235. *See also* Declaration of Rabbi Michael Sternfield;[41] *Libin*, above n.26.

More troubling than the City's characterization of the Mt. Soledad cross as a *secular* memorial, however, is its characterization of the Mt. Soledad cross as a memorial at all. Whereas Cyrus Yawkey's deed corroborates the genuineness of the commemorative objective attending the cross on Mt. Helix, no corresponding evidence corroborates the genuineness of the alleged commemorative objective which the City advances in support of the cross on Mt. Soledad. In fact to the contraty, the evidence indicates

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[41]Rabbi Sternfield declares:

> The religiosity of the cross is, if anything, heightened when it is used in connection with memorializing the dead, because of the close connection between our thoughts of death and our religious beliefs. A war memorial intended to honor all veterans, or all war dead, would send a message of exclusion of Jews if it were in the shape of a cross. While this might not be the intended message, the use of a cross for this purpose would nonetheless convey this message from the perspective of most Jews. . . The cross has not become a secular symbol, from the perspective of Jews, for any purpose, and because of the heightened religiosity of symbols when used in the context of death, it would not be reasonable to conclude that persons of non-Christian faiths would perceive this use of the cross as secular.

Declaration of Rabbi Michael Sternfield, October 26, 1990, at 1 (Plaintiff's Exhibit J).

that the city's purported commemorative objective is a pretext.

The numerous declarations, news articles, book excerpts and other exhibits submitted by the parties reveal only one occasion between the erection of the cross on Mt. Soledad and the filing of this lawsuit on which the cross site has ever been recognized as a war memorial.[43] That occasion was the cross' dedication on April 17, 1954, when the *San Diego Union* reported that the cross "is meant to be a lasting memorial to the dead of the two world wars and the Korean fighting." With the exception of this single newspaper report, there is no evidence that prior to this lawsuit the City intended the cross to serve as a memorial.

Correspondence between the City and the Mt. Soledad Memorial Association, which the city authorized to build and maintain the cross, together with newspaper accounts from 1954 indicate that the cross was intended to replace predecessor crosses which had once been the scene of Easter sunrise services but had since been vandalized or fallen into disrepair. Clearly these predecessor crosses, which date as far back as 1913, could not have been erected as memorials to the dead of the two world wars and the Korean fighting, all of which occurred after 1913. Nevertheless, the fact that non-commemorative crosses once stood on a site where citizens subsequently chose to erect a new cross should not by itself defeat the genuineness of the new cross' purported commemorative purpose.

News accounts reveal further indications of a religious purpose. Several such accounts indicate, for example, that a ceremony dedicating the cross occurred, as planned, on Easter Sunday 1954. Although Memorial Day occurs just 6 weeks after Easter, the Memorial Association evidently

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[43] *Since* this lawsuit was filed, several veterans ceremonies have been held atop Mt. Soledad. *See* above note 13.

preferred to schedule the cross' completion and dedication for the day of the Resurrection. Although it could have selected any of innumerable different symbols, including many different types of crosses, in order to commemorate fallen soldiers of all faiths, the Memorial Association selected the configuration of the *Latin* cross, the type of cross on which biblical and historical accounts indicate that Jesus Christ, on the morning marked by Easter, was crucified.

City records, correspondence and news articles indicate, moreover, that every Easter without fail since 1954, the Mt. Soledad Memorial Association has sponsored an Easter sunrise service at the site of the cross. There is no record of the Association, the City or any other organization having sponsored a memorial service or ceremony at the site of the cross on Memorial Day, Veterans Day or any other day between Easter Sunday 1954 and the day on which this suit was filed. Also during the period between Easter Sunday 1954 and the day on which this suit was filed, no plaque or sign existed to indicate to visitors that the cross was intended to commemorate our country's war dead. As plaintiffs observe, there was "no way for a visitor to know that on April 18, 1954, someone stood beside the Cross and described it as a veterans memorial."

In light of this evidence, it is not surprising that numerous travel guides, road maps, the Yellow Pages telephone directory and even federal government publications refer to the structure atop Mt. Soledad as the "Soledad Easter Cross." Even the Mt. Soledad Memorial Association itself appears to have lost sight of the purported purpose for which it erected the cross. Its own bylaws describe its purpose as the promotion of "community interest in the development of the public facilities of the Mt. Soledad Park area." The bylaws make no reference to the commemoration of war dead.

Faced with this battery of evidence, it is difficult to conclude that the commemorative objective advanced by the City is anything other than pretext. The court, therefore, finds that insofar as the disposition of the Mt. Soledad Latin cross, the City has impermissibly exhibited (if not exercised) preference. The City's conduct, consequently, is unconstitutional, and the City is directed that, if it truly wishes to honor the war dead, then it should do so other than with the Latin cross which it has permitted to stand atop Mt. Soledad. *Cf. Eckels*, 589 F.Supp. at 234 ("because the county can effectively recognize its war dead without resort to the use of these religious symbols, it must do so").

IV.

CONCLUSION

The No Preference Clause, which California courts and the Ninth Circuit have interpreted as censuring so much as even the appearance of religious partiality, is a sweeping constitutional edict. Insofar as the No Preference Clause is also the supreme law of California, binding constitutional precedent compels this court to hold that the permanent presence and disposition of the Latin crosses atop Mt. Helix, atop Mt. Soledad and on the La Mesa insignia are unconstitutional.

Were the parcels of land atop which the Mt. Helix and Mt. Soledad crosses presently stand privately rather than publicly owned, then these cases would be entirely different. Likewise were the crosses raised only periodically in order to accomodate individuals who from time to time wish to incorporate these public spaces in their religious observance, then again the court would be dealing with an entirely different situation. Where as here, however, the Latin cross appears as a permanent, salient symbol on public property and on a public imprimatur, California's Constitution will not permit it to continue to stand.

As to each of these three cases, the court enters summary judgment for plaintiffs and issues a permanent injunction forbidding the permanent presence of each cross on the public property or imprimatur where it currently appears. The court grants defendants three months within which to comply with its order and further directs that any stay of the order should be sought from the Court of Appeals.

IT IS SO ORDERED.

GORDON THOMPSON, JR.

GORDON THOMPSON, JR.
United States District Judge

Date: December 3, 1991

cc: All counsel

APPENDIX G

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JOHN MURPHY,

Plaintiff,

v.

BRIAN BILBRAY, GEORGE BAILEY, SUSAN GOLDING, LEON WILLIAMS AND JOHN MACDONALD, in their official capacities as members of San Diego County Board of Supervisors and the COUNTY OF SAN DIEGO,

Defendants.

PHILIP K. PAULSON, HOWARD KREISNER and the SOCIETY OF SEPARATIONISTS, INC.,

Plaintiffs,

v.

CITY OF SAN DIEGO, CALIFORNIA,

Defendant.

JAMES ELLIS,

Plaintiff,

v.

CITY OF LA MESA, et al.,

Defendant.

Filed February 5, 1991
Clerk U.S. District Court
Southern District of California

By _____

G-2

MEMORANDUM NOTICE

Civ. No. 90-0134 GT,
Civ. No. 89-0820 GT,
Civ. No. 90-0135 GT

The above-captioned cases present important issues on which the Ninth Circuit's pending ruling in *Hewitt v. Joyner,* No. 89-55199 may bear. Consequently, this court shall defer its ruling in the above-captioned cases until after the Ninth Circuit has ruled in *Hewitt.*

February 5, 1991
date

GORDON
THOMPSON, JR.
United States
District Judge

cc: All counsel

APPENDIX H

APPENDIX

JOHN W. WITT, City Attorney
TED BROMFIELD, Chief Deputy
KENNETH SO, Deputy
MARY KAY JACKSON, Deputy
202 "C" Street, 3rd Floor
San Diego, CA 92101
Telephone: (619) 236-6220

Attorneys for Defendant
The City of San Diego

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

PHILIP K. PAULSON, HOWARD T. KREISNER and the SOCIETY OF SEPARATIONISTS, INC.
Plaintiffs,

v.

THE CITY OF SAN DIEGO,
Defendant.

No. 89-0820 GT (IEG)
DECLARATION OF COLONEL BADGER IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

DATE: November 13, 1990
TIME: 10:30 A.M.
PLACE: Courtroom 1

My name is Colonel Frederick C. Badger. I am a member of the United States Army on active duty, serving as the Director of Engineering and Maintenance for the American Battle Monuments Commission. The Commission is a small separate agency of the Executive Branch of the Federal Government, responsible for the commemoration of our

Armed Forces where they have served since April 23, 1917. In doing so the Commission administers 24 cemetery memorials and 14 separate monuments on foreign soil.

To mark the final resting places of those members of our Armed Services whose remains could not be identified, the Commission decided that it would be appropriate to place a Latin cross at the gravesite. A cross was selected because it is a recognized symbol of serenity and passage from this life, perhaps to a better life. Inscribed on these crosses is "Here rests in honored glory a comrade in arms known but to God."

Should the records of an identified war dead not contain a religious preference, the FCB remains are marked by a Latin cross for the reasons given above. Inscribed on the cross is the FCB name, rank, serial number, organization and state of entry in the military service.

Eight (8) of our cemeteries are laid out in a cruciform design, not to identify any religion, but for the reasons previously given.

It is interesting to note that the standard symbol used on maps of the western world to identify cemeteries is a variation of the cruciform design.

I declare under penalty of perjury under the laws of the State of California that the foreging is true and correct.

Executed at 11:30 a.m., Washington, D.C. on February 7, 1990.

Colonel Frederick C. Badger

APPENDIX I

APPENDIX

Case No. 92-55087

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PHILIP K. PAULSON, HOWARD T. KREISNER & SOCIETY OF SEPARATIONISTS, INC.
Plaintiff-Appellees,

VS.

THE CITY OF SAN DIEGO
Defendants-Appellants.

APPEAL FROM THE UNITES STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

DECLARATION OF MARY KAY JACKSON IN SUPPORT OF APPELLANT'S REPLY BRIEF

JOHN W. WITT, City Attorney
JOHN M. KAHENY, Assistant
TED BROMFIELD, Chief Deputy
MARY KAY JACKSON, Deputy
202 "C" Street, 3rd Floor
San Diego, CA 92101
Telephone: (619) 236-6220
Attorneys for Defendant and Appellant

I, Mary Kay Jackson, declare as follows:

1. I am a deputy city attorney for the City of San Diego, counsel of record for the City in this case. As such, I have personal knowledge of the facts set forth herein and, if called upon to do so, could and would testify competently thereto. I submit this declaration in support of Appellant's Reply Brief, filed concurrently herewith.

2. I personally drove and clocked the mileage between San Diego City Hall and the site of the Mr. Soledad Cross. The total mileage is 13.6 miles.

3. Not only is the Mt. Soledad Cross 13.6 miles away from San Diego City Hall, it cannot be seen from the City Hall building because the view of Mt. Soledad is completely obstructed by a high-rise building behind San Diego City Hall.

I declare under penalty of perjury under the laws of the United States and California that the foregoing is true and correct and that this declaration is made this 31st day of March, 1992 at San Diego, California.

MARY KAY JACKSON
MARY KAY JACKSON

APPENDIX J

APPENDIX

Case No. 89-0820 GT (IEG)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

PHILIP K. PAULSON; HOWARD T. KREISNER; &
SOCIETY OF SEPARATIONISTS, INC.
Plaintiffs,

vs.

THE CITY OF SAN DIEGO,
Defendant.

DECLARATION OF WILLIAM KELLOG IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

My name is William J. Kellogg. I am President of the Mt. Soledad Memorial Association ("Association"). The Association was incorporated as a non-profit corporation in 1952 in order to solicit and disburse funds to build and erect a veterans memorial ("Memorial") at Mt. Soledad Natural Park. The Association remains active for the purpose of maintaining the Memorial and honoring our veterans. The Association retains members, holds regular meetings, has its own stationery, and maintains a bank account at Security Pacific Bank in La Jolla. (See Exhibits D-1, D-2, D-3, membership list of Association, treasurer's report, letterhead and envelope. I recognize these documents and can attest to their authenticity.)

The Memorial was built and erected using private funds and donated labor. (See Exhibit D-4, copy of blueprint of the Memorial, courtesy of the San Diego Chapter of A.I.A., Donald Campbell, Architect; Stanley Burne, Structural Engineer. I recognize this blueprint and can attest to its authenticity.)

The Association continues to raise funds for improvements to Mt. Soledad Natural Park, maintenance of the Memorial, and continued community involvement in the park. When the Memorial was originally dedicated, the Association did not have sufficient funds to have a suitable commemorative plaque made. Throughout the years, the maintenance costs to which the Association was bound by the City's 1952 resolution absorbed the Association's funds. We have recently been able to obtain enough additional money to have a suitable commemorative plaque made. On November 11, 1989, Veterans Day, the Association dedicated the commemorative plaque which was to be permanently affixed to the Memorial. However, an error was found on the plaque and the Association recently had a corrected plaque made. (See Exhibit D-5, photograph of plaque. I recognize this photograph and attest to its authenticity. It is a true and accurate representation.) This plaque, together with a sign listing those who contributed construction materials and labor, was affixed to the fence surrounding the Memorial on October 4, 1990. The sign is meant for all to see that the purpose of the Memorial has always been to provide a fitting and lasting tribute to America's veterans.

The Association presently sponsors Easter Sunrise Services for the Community at the park. (See Exhibit D-6, copy of permit for use of park. I recognize this document and can attest to its authenticity.) The City of San Diego is not involved in the service, other than issuing a permit to the Association.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

EXECUTED at San Diego, California on October 10, 1990.

WILLIAM J. KELLOGG

APPENDIX K

APPENDIX

RESOLUTION NUMBER R-910130-1

ADOPTED ON JANUARY 30, 1991

WHEREAS, the Historical Site Board for the City of San Diego held a noticed public hearing on January 30, 1991 to consider the historical site designation of Mount Soledad Park and Memorial Cross which is all of that property dedicated by action of the City Council as Mount Soledad Park; and

WHEREAS, in arriving at their decision, the Historical Site Board considered the historical/architectural report prepared by the applicant, the staff report and recommendation, all other materials submitted prior to and at the public hearing, inspected the subject property and heard public testimony presented at the hearing; and

WHEREAS, the Historical Site Board based its designation of Mount Soledad Park on its association with current and past civic leaders and historical figures; its being the highest point in the City and base point for the Fitch Survey for Pueblo lots; its association with significant local events (nearby location of the first West Coast heliograph station which broadcast during WWII and also the City's first television program); and its accessibility by the general public because it is a public park. The Soledad cross is a memorial erected to honor war veterans and the cross is only one of several memorial crosses, each different, which have existed on that site and it is the continuing use and its location as a memorial park which has historic significance.

NOW, THEREFORE,

BE IT RESOLVED, by the Historical Site Board for the City of San Diego, that in light of the foregoing, it hereby approves the historical site designation of the above described property, the area specifically designated being

Mount Soledad Park (all land dedicated by City ordinance) including the natural resources and these amenities: the memorial cross; the fencing originally from Old Town (as it also contributes to the historical significance of the park); and those trees planted in memoriam within the boundaries of the park, as Site No. 267.

By: _____

Kathryn Willetts
Chair, Historical Site Board

By: _____

Allisyn L. Thomas
Deputy City Attorney

APPROVED AS TO FORM AND
LEGALITY: JOHN W. WITT,
CITY ATTORNEY

APPENDIX L

HISTORICAL LANDMARKS DESIGNATED BY THE SAN DIEGO HISTORICAL SITE BOARD

HISTORICAL LANDMARKS DESIGNATED BY THE SAN DIEGO HISTORICAL SITE BOARD

H.S.B. Desig. No.	Historical Site or Structure	Address or Location
1	El Prado Area	Balboa Park
2	Mission Dam & Flume (Padre Dam)	Mission Valley
3	Fort Stockton Site	Presidio Park
4	Presidio of San Diego Site	Old San Diego
5	Calvary Cemetery Site	Mission Hills
6	New San Diego (Dunnell's) Hotel Site	348 W. "F" Street
7	Plaza de Pantoja y Arriaga	Downtown
8	Sherman-Gilbert House	Cultural Heritage Park-Old Town
9	Davis-Horton House	227 Eleventh St.
10	Torrey Pines Area	North San Diego
11	Villa Montezuma	1925 "K" Street
12	San Pasqual Battlefield Site	North San Diego
13	Montgomery Memorial State Park	
14	Old Town S.D. Historic State Park	Old San Diego

Owners Name and Address (Summary–if Available)	Date Desig.	Other Desig.	Misc. Info.
City Owned	9/7/67	12/12/76 Nat'l Reg.	
City Owned	2/1/68	Nat'l Reg. St.Mk.#52	
City Owned	2/15/68	St.Mk.#54	
City Owned	2/29/68	St.Mk.#59 Nat'l Reg.	
City Owned — Pioneer Park	2/29/68		
Demolished 9-69	1/23/69		
New Town Park	1/23/69		
County Owned	8/7/69	H.A.B.S.	
George Deyo (same address)	11/2/69	Nat'l Reg. H.A.B.S.#423	
City Owned — includes Torrey Pines Park	11/21/69		
City Owned	2/6/70	Nat'l Reg. H.A.B.S.#432	
State Owned	11/6/70	CHL#533	
State Owned	11/6/70	CHL#711	
State Owned	11/6/70	CHL#830	

HISTORICAL LANDMARKS DESIGNATED BY THE SAN DIEGO HISTORICAL SITE BOARD (Continued)

H.S.B. Desig. No.	Historical Site or Structure	Address or Location
	Following sites included in Old Town San Diego Historic State Park	
	a) Casa de Estudillo	
	b) Casa de Cota	
	c) Casa de Bandidni	
	d) Casa de Pedrorena	
	e) Casa de Machado-Silvas (de la Bandera)	
	f) Congress Hall Site	
	g) Casa de Machado-Stewart	
	h) Mason Street School — First School	
	i) The Exchange Hotel Site	
15	Chapel of the Immaculate Conception	3950 Conde Street Old San Diego
16	Whaling Station Site	Ballast Point
17	Lighthouse of 1854	Cabrillo Monument
18	Gill House	3776 Front Street
19	Fort Rosecrans National Cemetery	Point Loma

Owners Name and Address (Summary–if Available)	Date Desig.	Other Desig.	Misc. Info.
		Nat'l Reg.	
		CHL#53	
		CHL#75	
		CHL#72	
		CHL#70	
		CHL#71	
		CHL#66	
		CHL#73	
		CHL#538	
		CHL#491	
City Owned	11/6/70	CHL#49	
U.S. Owned	11/6/70	CHL#50	
U.S. Owned	11/6/70	CHL#51 Nat'l Reg.	
Robert D. Ferris	7/2/71		
U.S. Owned	11/6/70	CHL#55	

HISTORICAL LANDMARKS DESIGNATED BY THE SAN DIEGO HISTORICAL SITE BOARD (Continued)

H.S.B. Desig. No.	Historical Site or Structure	Address or Location
20	Ballast Point	La Playa
21	Casa de Lopez	3890 Twigg — Old Town
22	Old Playa Site	Bayside of Pt. Loma w/in Military Reserve
23	Fort Rosecrans Site	Point Loma
24	Whaley House	2482 San Diego Ave.
25	Serra Palm Site	Taylor Street — Old Town
26	Spanish Cemetery	San Diego Ave. and Artists
27	Fort Guijarros	Near base of Ballast Point
28	Derby Dike Site	Foot of Presidio Hill
29	Mule Hill Site	Four mile Southwest of Escondido
30	San Diego Barracks Site	Kettner Blvd. — "G" and Market Street Area
31	Kate O. Sessions Nursery Site	Pico and Balboa
32	Derby-Pendelton House	4017 Harney Street

Owners Name and Address (Summary–if Available)	Date Desig.	Other Desig.	Misc. Info.
U.S. Owned	11/6/70	CHL#56	
U.S. Holding Co. — J. Sutter U.S. Nat'l Bank Bldg. St.400	11/6/70	CHL#60 H.A.B.S.#47	
Demolished	11/6/70	CHL#61	
U.S. Owned	11/6/70	CHL#62	
County Owned	11/6/70	CHL#65 H.A.B.S.#422	
City Owned	11/6/70	CHL#67 Nat'l Reg.	
City Owned	11/6/70	CHL#68	
U.S. Owned	11/6/70	CHL#69	
U.S. Owned	11/6/70	CHL#244	
City Owned	11/6/70	CHL#452	
?	11/6/70	CHL#523	
City Owned	11/6/70	CHL#764	
County Owned	11/6/70	H.A.B.S.#430	

HISTORICAL LANDMARKS DESIGNATED BY THE SAN DIEGO HISTORICAL SITE BOARD (Continued)

H.S.B. Desig. No.	Historical Site or Structure	Address or Location
33	Spanish Landing Site	North Shore S.D. Bay
34	Gatewood House	2515 San Diego Ave.
35	Presidio Excavation Site	Presidio Park
36	Emmet House Site	3919 Twiggs-Old Town
37	Long-Waterman House	First and Kalmia 2408 First
38	Timken House	First and Laurel
39	Quartermass-Wilde House	2404 Broadway
40	George Marston House	3525 Seventh
41	Fredrick R. Burnham House	3565 Seventh
42	Aguirre House Site	Old Town S.D.
43	Gils House Site	Old Town S.D.
44	Franciscan Gardens Site	Old Town S.D.
45	San Pasqual Graves Site	Trias between Hancock and Moore

Owners Name and Address (Summary–if Available)	Date Desig.	Other Desig.	Misc. Info.
Port of San Diego	11/6/70		
Frider Trup 1843 Edgemont, S.D.	11/6/70		House of ?? Union ??
City Owned	11/6/70		
Demolished	11/6/70		First ?? Site
Parker Industries 2408 First, San Diego	12/4/70	Nat'l Reg. 6/14/76	
Mrs. Arthur L. Austin 3586 First Ave., San Diego	12/4/70		
Sherman, Ottro and Havilind (Same Address)	12/4/70		
City Owned	12/4/70	Nat'l Reg. H.A.B.S.	
Robert O. Peterson 3563 Seventh	12/4/70	H.A.B.S.	
Demolished	12/4/70		
Demolished	12/4/70		
Demolished	12/4/70		
Demolished	12/4/70		

HISTORICAL LANDMARKS DESIGNATED BY THE SAN DIEGO HISTORICAL SITE BOARD (Continued)

H.S.B. Desig. No.	Historical Site or Structure	Address or Location
46	Cobblestone Jail Site	Haraszthy Jail-Old Town
47	Protestant Cemetery Site	Ampudia Street-Old Town
48	Hebrew Cemetery Site	Kenyon Street
49	Klauber House	3060 Sixth Street
50	Arthur Marston House	3575 Seventh Street
51	Horton Plaza and Fountain	Brodway between Third and Fourth
52	Britt Scripps House	406 Maple
53	Florence Hotel Tree	Grape between Third and Fourth
54	Brooklyn Hotel (Kahles Saddlery)	733-739 "E" Street
55	Jennings House	1018 Rosecrans
56	Santa Fe Depot	1050 Kettner Blvd.
57	H.E. Watts House	1767 Second Ave.

Owners Name and Address (Summary–if Available)	Date Desig.	Other Desig.	Misc. Info.
Demolished	12/4/70		
Demolished	12/4/70		
Demolished	12/4/70		
Allen S. Klauber — (same address)	1/22/71	Nat'l Reg.	Demolished 10/15/7?
Arthur Marston — (same address)	1/22/71		Designation Rescinded 12/6/74
City Owned	3/19/71		
Dr. and Mrs. Albert Hackim 2335 Juan Street	10/1/71		
Center City Hospital — 5252 Balboa	12/3/71		Morton ??? (Ficus Macron)
John B. Kahle (same address)	1/7/72		
Clotide Xavier Soares 3248 Mohican Ave. San Diego	1/7/72		
Santa Fe Railway	2/4/72	Nat'l Reg. June 26, 1977	
Martha E. Bekker (same address)	2/4/72		

HISTORICAL LANDMARKS DESIGNATED BY THE SAN DIEGO HISTORICAL SITE BOARD (Continued)

H.S.B. Desig. No.	Historical Site or Structure	Address or Location
58	Livingston House	2412 "J" Street
59	Litgow-Hackett Torrey Pine	1534 First Ave.
60	Ford Building	Balboa Park
61	DESIGNATION RESCINDED	
62	Lee House No. 2 (by Irving Gill)	3353 Albatross St.
63	Lee House No. 4 (by Irving Gill)	3367 Albatross St.
64	Teats House No. 2 (by Irving Gill)	3415 Albatross St.
65	Teats House No. 3 (by Irving Gill)	3407 Albatross St.
66	Backesto Block Building*	614 Fifth Ave.
67	Hubbell Building*	813 Fifth Ave.

Owners Name and Address (Summary–if Available)	Date Desig.	Other Desig.	Misc. Info.
Rev. Robert L. Stevens (same address)	3/3/72		
W.E. Bistick & C.E. Bentzel 1550 First Ave.	3/3/72		Tree removed
City Owned	4/7/72	Nat'l Reg.	
DESIGNATION RESCINDED			
Dr. and Mrs. D.D. Hudsor. (same address)	5/10/72		
Miss Sheilia Stebbings (same address)	5/10/72		
Mrs. Jargo Paternella (same address)	5/10/72		
Mr. and Mrs. Pemberton (same address)	5/10/72		
Sam Ellis (Ellis Investment Co.) 2464 Marilouise Way, Calexico, CA	6/2/72	H.A.B.S.#27	
Morris and Rose Paton Culver City, CA	6/2/72		

HISTORICAL LANDMARKS DESIGNATED BY THE SAN DIEGO HISTORICAL SITE BOARD (Continued)

H.S.B. Design No.	Historical Site or Structure	Address or Locations
68	Marston Building*	809 Fifth Ave.
69	McGurck Block*	611 Fifth Ave.
70	I.O.O.F. Building* (Masonic Building)	526 Market Street
71	Keating Building*	432 "F" Street
72	Nesmith-Greely Building*	825 Fifth Ave.
73	Louis-Bank of Commerce*	835-845 Fifth Ave.
74	Yuma Building*	631 Fifth Ave.
75	Johnson-Taylor Adobe of Rancho de los Penasquitos	Rancho Penasquitos
76	Spreckels Theatre	123 Broadway

* Located in the "Gaslamp District" Lower Fifth District

Owners Name and Address (Summary–if Available)	Date Desig.	Other Desig.	Misc. Info.
C.V. Pipitone, 3929 Bandini Street, San Diego	6/2/72		
C.H. Richardo, Metropole Hotel, San Diego	6/2/72	H.A.B.S.#428	
Odd Fellows — Independent Order of the Masons (same address) Chas. & Rob't Tyson, 780 Kettner Blvd., S.D.	6/2/72	H.A.B.S.#429 Nat'l Reg. 1/31/78	
E.B. Wallack, 2300 Front St., San Diego, CA #205	6/2/72		
Walnut Corp. of Los Angeles	6/2/72		
Mr. Woodrow Ratner (same address)	6/2/72		
Jack and Marsha Ottestad, 1442 Muirlands Dr., La Jolla	6/2/72		
Irvin Kahn Penasquitos Assoc., 3232 Governor Way, San Diego	8/4/72		
Mrs. Jaquelin Littlefield	8/4/72	Nat'l Reg.	

HISTORICAL LANDMARKS DESIGNATED BY THE SAN DIEGO HISTORICAL SITE BOARD (Continued)

H.S.B. Desig. No.	Historical Site or Structure	Address or Location
77	Balboa Theatre	648 Fourth Ave.
78	"Weldon-Glasson House" (Chateau De Toman)	3139 Franklin St.
79	La Jolla Women's Club	715 Silverado St.
80	Adobe Falls	Por. Lot 67 Part. map of Rancho Mission #330
81	Pledras Pintados	Northwest corner of Rancho Bernardo
82	Temple Beth Israel	Heritage Park
83	San Diego Steam Laundry	Colubia & "B"
84	Green Dragon Colony Site	Prospect St. La Jolla
85	Hayward-Patterson House	2148 Broadway
86	La Jolla Recreational Center	615 Prospect St. La Jolla
87	Ruiz-Alvarado Adobe Ranch House	Rancho de los Penasquitos
88	First National Bank	Fifth and "E" St.

Owners Name and Address (Summary–if Available)	Date Desig.	Other Desig.	Misc. Info.
Russo Suburban Enterprises, 702 Redondo Ct., San Diego	8/4/72		
McKinley Thomas (same address)	11/3/72		
La Jolla Woman's Club	3/2/73	Nat'l Reg.	
State Division of Highways Cal. State Univ. Christiana	4/6/73		
City Owned	4/6/73		
County Owned	6/1/73	Nat'l Reg. 5/22/78	
Steam Laundry Bldg. – c/o E.C. Malone Co.	6/1/73		
Robert Mosher	7/6/73		Designation was moved; land & bldg. demolished
Don and Cleone Frace	9/7/73		
City Owned	9/7/73		
Penasquitos Inc.	10/5/73		
Tom and George Hom	10/5/73		

HISTORICAL LANDMARKS DESIGNATED BY THE SAN DIEGO HISTORICAL SITE BOARD (Continued)

H.S.B. Desig. No.	Historical Site or Structure	Address or Location
89	Plunge	Belmont Park
90	Roller Coaster	Belmont Park
91	Merry-Go-Round	Belmont Park
92	Spencer-Ogden Building	SW Corner of Fifth and "F"
93	Llewelyn Building	722-728 Fifth Ave.
94	Judge Torrance House	136 Juniper
95	Grand-Horton Hotel	332 "F" Street
96	Golden West Hotel	720 Fourth Ave.
97	Mary Cassitt House (No. 4)	3526 Seventh Ave.
98	Teats House (No. 1)	3560 Seventh Ave.
99	Alice Lee Residence	3578 Seventh Ave.
100	House-Lot D, Block 2334 Horton Addition	1929 Front Street
101	Red Rest and Red Roost Cottages	11878 & 1179 Coast Blvd., La Jolla
102	Tyrolean Terrace Land Site	1290-1298 Prospect La Jolla
103	"Cole Block" Site	N.W. Corner of Fifth & "G" Streets

Owners Name and Address (Summary–if Available)	Date Desig.	Other Desig.	Misc. Info.
City Owned	12/7/73		
Bill Evans	12/7/73	Nat'l Reg.	
Bill Evans	12/7/73	Nat'l Reg.	Dismantled
John B. Ogden	3/1/74		
Mrs. W.J. Reed	4/5/74		
Kennedy-Blackman Corp.	4/5/74		
N.C. Sutter, R. Johnson & F. Bertolind	4/5/74		
J.D. & A.B. Spreckles Security Co. c/o Rudick, Leven, Platt, and Leavitt	9/6/74		
Mrs. Alice O. Stewart	10/4/74		
Robert and Phyllis Vodicka	10/4/74		
Andres & Maria Calderon	10/4/74		
Evelyn Anderson	11/1/74		
Mr. Heimburge	1/3/75	Nat'l Reg. 3/15/76	
Mr. Allison	2/7/75		
V. Navarra & T. Carniglia 3682 Kite St., San Diego	5/2/75		

HISTORICAL LANDMARKS DESIGNATED BY THE SAN DIEGO HISTORICAL SITE BOARD (Continued)

H.S.B. Desig. No.	Historical Site or Structure	Address or Location
104	Sherman-Doig House	136 W. Fir St., W. ½ E&F Blk. 234, Horton's Addition
105	San Diego Rowing Club	525 E. Harbor Dr.
106	Waldo Waterman Monument	Corner of Maple & Albatross Streets (northerly terminus)
107	Cliff Mansion	1203 Sunset Cliffs Blvd.
108	Pottery Canyon Park	2725 Torrey Pines Rd.
109	Buckner Hotel	765–10th Ave.
110	Klessig Corner	1401-19 2nd Ave. and 222 Ash St.
111	U.S. Custom and Court House	325 West F Street
112	Theosophical Institute a. Spaulding Home b. Greek Theatre c. Beaver Home d. Lotus Home e. Madam Tingley Home	3900 Lomaland Drive, Pt. Loma, CA

Owners Name and Address (Summary–if Available)	Date Desig.	Other Desig.	Misc. Info.
Ted and Jan Krauss, 6115 La Jolla Blvd., La Jolla, CA 92037	7/11/75		
San Diego Rowing Club, Prop. Owner — Port Authority	7/11/75	National Register (8/30/79)	
City of San Diego	8/1/75		
Mr. & Mrs. Robert Baxley, 1203 Sunset Cliffs Blvd.	12/5/75		
Cornelio & Abraham Rodriguez, 2725 Torrey Pines Rd.	2/6/76		Land Owned City of S.D.
Zondra Reed Schmidt, 5 Cats Paw Cape Coronado, CA 92118	4/2/76		
Sandor Shapery (as of 7/26/76), 1205 Prospect, Suite 430, La Jolla, CA 92037	7/9/76		
U.S. Government, General Services Admin., 49–4th Street, San Francisco, CA	7/9/76	Nat'l Reg.	
Pt. Loma College, 3900 Lomaland Drive, Pt. Loma, CA	8/6/76		

HISTORICAL LANDMARKS DESIGNATED BY THE SAN DIEGO HISTORICAL SITE BOARD (Continued)

H.S.B. Desig. No.	Historical Site or Structure	Address or Location
113	Mission San Diego de Alcala	10818 San Diego Mission Road
114	McConaughy House	1569 Union St.
115	Herne Surgical Hospital — The Ashforth	420 Ash Street
116	Spruce Street Suspension Footbridge	Spruce Street between Front and Brant Streets
117	El Pueblo Ribera	230-248 Gravilla St. 231-309 Playa del Sur, La Jolla
118	Charles A. Martin House	3147 Front St., S.D.

Owners Name and Address (Summary–if Available)	Date Desig.	Other Desig.	Misc. Info.
Roman Catholic Bishop of S.D. Diocesan Office of Apostolic Ministry, Alcala Park San Diego, CA 92110	8-6-76	Nat'l Reg.	
Kent B. Casady, et al. 326 Juniper St. San Diego, CA 92101	11-5-76		
Ms. Rosemary Layng 420 Ash Street	12-3-76		
City of San Diego	1-7-77		
J. Wilson — 235 Playa del Sur G. Cheney — 309 Playa del Sur S. Campanella — 243 Playa del Sur M. Tellep — 238 Gravilla St. D. Cincotta — 134 S. LaSalle, Chicago, Ill	2-4-77		
Joan Janney Easly 3147 Front St.	3-4-77		

HISTORICAL LANDMARKS DESIGNATED BY THE SAN DIEGO HISTORICAL SITE BOARD (Continued)

H.S.B. Desig. No.	Historical Site or Structure	Address or Location
119	George H. Scripps Memorial Marine Biological Laboratory	8602 La Jolla Shores Drive, La Jolla, CA
120	The Tucker House	2470 Union Street
121	The Rynearson House/Mansion	2441 "E" Street
122	The Faulk-Klauber House	3000 "E" Street

Owners Name and Address (Summary–if Available)	Date Desig.	Other Desig.	Misc. Info.
Regents of the University of California, Berkeley, CA	5-6-77	Nat'l Reg. 11/10/77	
Michael R. Jones Sara Van Ammelrooy	7-8-77		
William R. Bennett Jean Leonard Harris	8-5-77		
Richard Brown, Jan McConnor 3000 E Street, S.D. 92102 & Bette Dee Swartz	1-6-78		

HISTORICAL LANDMARKS DESIGNATED BY THE SAN DIEGO HISTORICAL SITE BOARD (Continued)

H.S.B. Desig. No.	Historical Site or Structure	Address or Location
123	Residence	1632 Union Street
124	Fulford Bungalow No. 1	2516 San Marcos Ave., S.D.
125	Fulford Bungalow No. 2	2518 San Marcos Ave.
126	Fulford Bungalow No. 3	2520 San Marcos Ave.
127A	Gaslamp Quarter Historic District Historic & Architecturally Significant Buildings in the Gaslamp Quarter numbered from A-1 through A-30.	Gaslamp Quarter Centre City, San Diego bounded by 4th & Broadway, 6th at the Santa Fe R.R. tracks.
127B	Gaslamp Quarter Historic District Buildings of Apparent Secondary Significance in the Gaslamp Quarter numbered from B-1 through B-46	Same as above

Owners Name and Address (Summary–if Available)	Date Desig.	Other Desig.	Misc. Info.
John M. Burns 921 W. Quince Street, S.D.	2/3/78		
Douglas E. and Jerilyn Jones 2516 San Marcos, Ave., S.D.	6/2/78		
Azalea P. Gorby, estate of 2518 San Marcos, Ave., S.D.	6/2/78		
Wayne and Virginia Taylor 2520 San Marcos, Ave., S.D.	6/2/78		
Various Ownerships	6/2/78		
SEE ATTACHED LIST AS A PART HEREOF			
Same as above	6/2/78		
SEE ATTACHED LIST AS A PART HEREOF			

HISTORICAL LANDMARKS DESIGNATED BY THE SAN DIEGO HISTORICAL SITE BOARD (Continued)

H.S.B. Desig. No.	Historical Site or Structure	Address or Location
127A	Gaslamp Quarter Historic District No. 1	Centre City, San Deigo bounded by 4th & Broadway, 6th at the Santa Fe R.R. tracks
I	Historic & Architecturally Significant Buildings in the Gaslamp Quarter:	
1	Granger Building	SW corner Fifth & Broadway
2	Samuel I. Fox Building	531 Broadway
3	University Boot Shop	939 Fifth Ave.
4	Robinson Building	NE corner Fifth & E
5	First National Bank Building	NW corner Fifth Ave. and E
6	Louis Bank of Commerce (Ratners)	835-837 Fifth Ave.
7	Nesmith-Greely Building	825 Fifth Ave.
8	Hubbell Building	815 Fifth Ave.
9	Marston Building	809 Fifth Ave.
10	Keating Building	NW corner Fifth & F
11	Spencer Ogden Building	SW corner Fifth & F
12	Llewelyn Building	722-728 Fifth Ave.
13	George Hill Building	SW corner Sixth & F

Owners Name and Address (Summary–if Available)	Date Desig.	Other Desig.	Misc. Info.
	6/2/78	Nat'l Reg. (pending)	

HISTORICAL LANDMARKS DESIGNATED BY THE SAN DIEGO HISTORICAL SITE BOARD (Continued)

H.S.B. Desig. No.	Historical Site or Structure	Address or Location
14	Cole Block	NW corner Fifth & G
15	Theater Building	SW corner Fifth & G
16	Aztec Theater, (Bancroft Bldg.)	SE corner Fifth & G
17	Yuma Building	
18	I.O.O.F. Building	631 Fifth Ave.
19	McGuick Block	NW corner Sixth & Market
20	Backesto Block	NW corner Fifth & Market
21	Marin Hotel	554 Fifth Ave.
22	Rio Hotel	536 Fifth Ave.
23	Cafe Building	next to SE corner Fifth & Island
24	City Rescue Mission	527 Fifth Ave.
25	Grand Pacific Hotel	SW corner Fifth & J
26	Brunswick Drug Company	363 Fifth Ave. SE corner Fifth & J
27	Brick Warehouses	Fifth & K
28	Van Waters & Rogers Building	SE corner Fifth & K
29	Manila Cafe	515 Fifth Ave.
30	Royal Pie Bakery	554 Fourth Ave.

Owners Name and Address (Summary–if Available)	Date Desig.	Other Desig.	Misc. Info.

HISTORICAL LANDMARKS DESIGNATED BY THE SAN DIEGO HISTORICAL SITE BOARD (Continued)

H.S.B. Desig. No.	Historical Site or Structure	Address or Location
127B	Buildings of Apparent Secondary Significance	
1	Palace Pawnbrokers	947½ Fourth Ave.
2	Office Building	901 Fourth Ave.
3	Caruso's Pleasure Palace	815 Fourth Ave.
4	The Exchange	807 Fourth Ave.
5	Patrick's	801 Fourth Ave.
6	Club Tokyo	401 F
7	Gaslite Saloon	739 Fourth Ave.
8	Volunteers of America	655 Fourth Ave.
9	V. A. As Is Store	655 Fourth Ave.
10	Import Store-Chinese Restaurant	404 Market
11	Crossroads Bar	345 Market
12	Filipino Service Center	401 Market
13	Residential Hotel	547 Fourth Ave.
14	Chinese Laundry	ca 540 Fourth Ave.
15	Tool sales/laundry	527 Fourth Ave.

Owners Name and Address (Summary–if Available)	Date Desig.	Other Desig.	Misc. Info.

HISTORICAL LANDMARKS DESIGNATED BY THE SAN DIEGO HISTORICAL SITE BOARD (Continued)

H.S.B. Desig. No.	Historical Site or Structure	Address or Location
16	Wholesale Florists	521 Fourth Ave.
17	Sewing Factory	520 Fourth Ave.
18	Industrial Buildings	355 Fourth Ave.
19	T.M. Cobb Co. & Sign Shop	415 K Street.
20	Le Baron Distributing	SW corner Sixth & L
21	Brunswig Drug Acid yard	348 Sixth Ave.
22	Jerry Gonzales Produce	537 J
23	Produce Market	428-32 J
24	Produce Market	450-62 J
25	Three Storefront-Hotels	520-540 Sixth Ave.
26	Alan John Factory	568 Sixth Ave.
27	Butcher Shop	326 Fifth Ave.
28	Chinese Market-Hotel	502-506 Fifth Ave.
29	Pacific Hotel adjoining bldg.,	536 Fifth Ave.
30	ABC Pool Hall	540 Fifth Ave.
31	Zebra Club	552 Fifth Ave.
32	Hotel	562 Fifth Ave.
33	Sun Cafe	421 Market

Owners Name and Address (Summary–if Available)	Date Desig.	Other Desig.	Misc. Info.

HISTORICAL LANDMARKS DESIGNATED BY THE SAN DIEGO HISTORICAL SITE BOARD (Continued)

H.S.B. Desig. No.	Historical Site or Structure	Address or Location
34	Follies Theatre	615 Fifth Ave.
35	Casino Theatre	635 Fifth Ave.
36	Various Storefronts	926-760 Fifth Ave.
37	Two Storefront/Offices	744-756 Sixth Ave.
38	Engineers Service Company	830 Sixth Ave.
39	St. James Hotel	844 Sixth Ave.
40	Various Storefronts	822-850 Fifth Ave.
41	Flagg Shoes	935 Fifth Ave.
42	Long Drugs	945 Fifth Ave.
43	Hotel	SE corner Fifth & F
44	Store Front	755 Fifth Ave.
45	Former City Hall	664 Fifth Ave.
46	Ardmore Hotel	532-536 Fourth Ave.
128	Heritage Place — La Jolla	7210 La Jolla Blvd.
129	Sherman-Judson House	1930 First Ave.
130	Greater Golden Hills Hist. Dist. No. 2.	Russ Blvd. on N., Hwy. 94 on S., 25th St. on E. and 24th St. on W.
131	Western Metals Building	215 Seventh St., S.D.
132	The Watts Building	520 "E" St., S.D.

Owners Name and Address (Summary-if Available)	Date Desig.	Other Desig.	Misc. Info.
J. W. and P. Schaelchlin 1257 Virginia Way La Jolla, Calif. 92037	7/7/78		
Gene Holle, 1930 First Ave., S.D.	9/1/78		
Multiple	10/6/78		
B. McKenzie, James, Geo., Tom Hom A limited Partnership	11/3/78		
Geo. J. Yablonickv, J. Belanich	12/1/78		

HISTORICAL LANDMARKS DESIGNATED BY THE SAN DIEGO HISTORICAL SITE BOARD (Continued)

H.S.B. Desig. No.	Historical Site or Structure	Address or Location
133	Galusha B. Grow Cottage	7831 Ivanhoe Avenue
134	Chaplain's Residence	836 Washington St. E.
135	Medico-Dental Building	233 "A" Street
136	Brodrick-Kenny House	2133 Second Avenue
137	The Royal Pie Bakery	560 Fourth Avenue
138	The Gorham House	2042 Kearny Avenue
139	Elk's Hall	350 Cedar Street
140	Robert E. Lee Hotel/Lyceum Theater/Commodore Hotel	815 Third (Hotel) & 314 F Street (Theater)
141	Hotel Knickerbocker	315 "E" Street

Owners Name and Address (Summary–if Available)	Date Desig.	Other Desig.	Misc. Info.
Mir Kashani, 9862 La Jolla Farms, S.D.	2/16/79		
Sharon Hilliard, 836 Washington St. (East) S.D.	2/2/79	Nat'l Reg 11/24/78	
Two-thirty-three Assoc. Lmtd. 233 "A" St., S.D.	3/2/79		
Dortha L. Sewell P. O. Box 3041 Chula Vista, CA 92011	5/4/79		
Mrs. Martha Kuhnel 1610 Brooks Avenue San Diego, CA	6/1/79		(part of Gaslamp Quarter)
Ms. Peggy Duly 3634 Seventh Avenue #5B San Diego, CA 92103	8/3/79	Grade #3	*Includes Interior
California Western School of Law 350 Cedar Street, S.D. 92101	11/2/79		Grade #2
Margaret A. Allen 1010 Second Ave. Suite 1917 San Diego, CA 92101	1/11/80	Nat'l Reg. 5/31/80	Grade #2
California First Bank, Trustee 530 "B" Street, S.D. 92101	1/11/80		Grade #3 Demolished 11/8/80

HISTORICAL LANDMARKS DESIGNATED BY THE SAN DIEGO HISTORICAL SITE BOARD (Continued)

Desig. No.	Grade	Historical Site or Structure	Address or Location
142	1	Neresheimer-Tingley House	430 Silvergate Ave.
143	2	Chicano Park	From Crosby St. to Dewey St. to Evans St. between Logan Ave., National Ave. and Newton Ave.
144	2	Pythian Building	870 Third Ave. and 227 E Street
145	2	McClintock Storage Warehouse/ Bekins Building	1202 Kettner Blvd.
146	3	Stough-Beckett Cottage	2203 Denver Street
147	2	The Marin Hotel	552 Fifth Avenue
148	2	The Hawthorne Inn	2121 First Avenue
149	2	The Garrettson House	2366 Front Street

Owners Name and Address (Summary–if Available)	Date Desig.	Other Desig.	Misc. Info.
Clyde Munsell 430 Silvergate Ave.	3/7/80		Include exterior gardens landscape
City of San Diego	3/7/80		*Special restrictions See
City of San Diego	4/8/80	Natl Reg 11/14/80	Includes interior
The Bekins Company 777 Flower Street Glendale, CA	7/1/80	Natl Reg 10/3/80	
Joye & Ernest Mason 908 Archer Street	8/5/80		
Norman & Christina Starr, 824 Jamaica Ct. S.D. 92109	11/4/80		
Dr. Breffni C. & Gladys C. Barrett 5273 Prosperity Lane San Diego 92115	11/4/80		
D.F. Garrettson (original) Rachel T. Hale (present) 2366 Front Street San Diego, CA 92103	4/7/81		

HISTORICAL LANDMARKS DESIGNATED BY THE SAN DIEGO HISTORICAL SITE BOARD (Continued)

Desig. No.	Grade	Historical Site or Structure	Address or Location
150	1	Chinese Benevolent Society Building	438 Third Avenue
151	2	Ying-On Merchants and Labor Building	502 Third Avenue
152	1	Stingaree Bordello	303-23 Island Avenue
153	2	Major Myles Molan House	2214-24 Second Ave.
154	3	Kahle Residence	1058 21st Street
155	3	High House	2222 "F" Street
156	2	Wegeforth House	210 Maple Street
157	2	Park Place Methodist Episcopal Church South	508 Olive Street
158	2	The S.I. Fox Home	1004 24th Street
159	3	The Klauber-Wangenheim Bldg.	611 Island Avenue
160	3	The Sherman Hearne House	633 20th Street
161	3	The Panama/Senator Hotel	105 West "F" Street

Owners Name and Address (Summary–if Available)	Date Desig.	Other Desig.	Misc. Info.
Chinese Consolidated Benevolent Assn. 426-28 Third Avenue San Diego, CA 92101	6/2/81		
Ying-On Merchants and Labor Benevolent Assn., Inc. 502 Third Avenue	6/2/81		
	7/7/81		
Douglas F. Olins 2718 Fifth Ave.	7/7/81		
James Witte 1058 21st Street	8/27/81		
Gerald W. & Ione Lynne McDonald 2222 "F" Street	8/27/81		
Junior League 210 Maple Street	10/6/81		
5th & Olive Assoc. (a gen. partnership) 931 A Jamacha Rd. El Cajon, CA 92020	11/3/81		
Golden Venture I 1004 24th Street	1/27/82		
Klauber-Wangenheim Co.	1/27/82		
Richard N. Sager 633 20th Street			
Senator Investors 7427 Girard Avenue La Jolla 92037	5/26/82		

HISTORICAL LANDMARKS DESIGNATED BY THE SAN DIEGO HISTORICAL SITE BOARD (Continued)

Desig. No.	Grade	Historical Site or Structure	Address or Location
162	3	The Showley Brbs. Candy Factory	305-308 Eighth Ave.
163	3	Dr. Harry & Rachel Granger Wegeforth Home	3004 Laurel Street
164	3	La Jolla fire Station Engine Co. 13	7877 Herschel Avenue
165	3	Hollington House	171 21st Street
166	3	Wisteria Cottage	780 Prospect Street
167	3	The Coulter Residence	3162 Second Avenue
168	3	The Nower-Good Residence	866 24th Streeet
169	3	The Ernest & Ileen White Residence	136 Redwood Street
170	1	Duehn-St. John Residence	4720 Kensington Dr.
171	3	The Alphonzo Risley House	845 20th Street
172	3	The Charlotte Bushnell House	2368 Second Avenue
173	3	Otis Residence	3255 Second Avenue
174	3	Mertzmann-Winans Residence	3303 Second Avenue
175	2	Hotel San Diego	339 W. Broadway

Owners Name and Address (Summary–if Available)	Date Desig.	Other Desig.	Misc. Info.
The Candy Factory, Ltd. 1850 Fifth Avenue San Diego 92101	5/26/82		
James P. and Billie J. Wucher 3004 Laurel Street	6/30/82		
The City of San Diego	6/30/82		
Michael R. Hyduck	8/25/82		
Anne & Mary E. Revelle 7348 Vista del Mar La Jolla	8/25/82		
Dr.'s Joe and Joella Utley	10/27/82		
Dr.'s Leon and Joyce Nower 2829 Broadway	10/27/82		
	12/10/82		
Gary A. Gallerstein & Nancy Joan Gallerstein	12/10/82		
Roger Nulton	12/10/82		
A. Chidichimo	1/26/83		
Burton A. Stein/Betty and Jacob Reiss	2/23/83		
Rev. Thomas A. Owen-Towle and Carolyn S. Owen-Towle	3/23/83		
Walnut Properties	4/27/83		

HISTORICAL LANDMARKS DESIGNATED BY THE SAN DIEGO HISTORICAL SITE BOARD (Continued)

Desig. No.	Grade	Historical Site or Structure	Address or Location
176	1	John D. Spreckles Building (Bank of America, Home Federal Building)	Southeast corner Sixth and Broadway
177	2	The Simon Levi Company Building	715 J Street
178	3	Day's Little House	3518 Third Avenue
179	1	George Kautz House	7753 Draper Avenue
180	2	Scripps Residence	1355 28th Street
181	3	The Little Hotel by the Sea	8045 Jenner Street
182	3	Fleming Residence	2250 "B" Street
183	3	Frary House	3227 Grim Avenue
184	2	Anthony Residence	3333 Front Street
185	2	John B. Judson House	17826 Bandy Canyon Rd., San Pasqual
186	2	Moore House	3351 Front St.
187	2	Nason Residence	2169 First Ave.
188	2	Wiard Family Residence	3536 Front Street

Owners Name and Address (Summary–if Available)	Date Desig.	Other Desig.	Misc. Info.
Home Federal S&L Assn.	4/27/83		
Raymond D. & Avery Spice	7/27/83		
John D. Robuck, M.D.	9/28/83		
Juana Kaltenbach Estate	9/28/83		
Susan Sutherland	10/19/83		
Don N. Emerson	11/30/83		
Esther L. Addis	11/30/83		
Harold W. Dugdale Carole E. Dugdale	1/18/84		
Elmer N. & Gail Schaefer	5/23/84		
City owned	5/23/84		
Alan A. Abrams & Janeen Kerper, Marc D. Lewkowicz; Sharon Grodner 3519 Front St., SD 92103	6/27/84		
Ethel Siegelman and Roberta Peterson (same address)	6/27/84		
Dr. Sallee 3356 Second Ave. San Diego, CA 92103 693-3044	6/27/84		

HISTORICAL LANDMARKS DESIGNATED BY THE SAN DIEGO HISTORICAL SITE BOARD (Continued)

Desig. No.	Grade	Historical Site or Structure	Address or Location
189	2	The Eagles Hall	733 8th Avenue San Diego 92101
190	3	The Alfred C. Platt House	934 23rd Street
191	3	The Tinken Building	861 Sixth Avenue San Diego, 92101
192	3	Sless House	3720 Third Avenue San Diego
193	1	Golden View Apartments	2331 E Street San Diego 92103
194	3	Hazard Residence	2330 Third Avenue San Diego, CA 92103
195	3	Levi Wholesale Grocery Building	330 8th Avenue San Diego, CA 92101
196	3	Darnaud Residence	1221 22nd Street San Diego, CA
197	3	Waters Residence	2124 Broadway San Diego, CA 92101
198	2	George Keating Residence	2331-35 2nd Avenue San Diego, CA 92101

Owners Name and Address (Summary–If Available)	Date Desig.	Other Desig.	Misc. Info.
Michael & Margaret Speyer (same address)	7/25/84		
Antonia Pantoja Wilhelmina Perry (same address)	10/31/84		
Timken Building Ltd. 734 First Avenue San Diego, CA 92101	11/28/84		
Bob Gross/Julie Mazo 608 Pennsylvania Ave. San Diego, CA 92103 296-6219 (p.m.s. only)	11/28/84		
Oscar Abernathy, Jr. 204 S. Rexford Dr. Beverly Hills, CA 90212	1/23/85		
Scott & Genevieve O'Mara 2550 Fifth Ave. San Diego, CA 92103	2/27/85		
Kvaas Construction Co. 1950 Othello Street San Diego, CA 92111-0984	2/27/85		
Michael & Barbara London 2148 Broadway San Diego, CA 92102	6/26/85		
Faye Young P.O. Box 8157 San Diego, CA	6/26/85		
George Pearn 6442 Deep Dell Place Los Angeles, CA 90062	7/24/85		

HISTORICAL LANDMARKS DESIGNATED BY THE SAN DIEGO HISTORICAL SITE BOARD (Continued)

Desig. No.	Grade	Historical Site or Structure	Address or Location
199	2	Judge Monroe Anderson House	2257 Front St. San Diego, CA 92101
200	1	A.H. Sweet Residences	435 Spruce St. and 3141 Curlew San Diego, CA 92103
201	3	Mary R. Billmeyer House	1100 22nd Street
202	1	Alfred Mitchell Residence	1506 31st Street 92102
203	1	County Administration Bldg. (Civic Administration Center)	1600 Pacific Hwy.
204	1	La Valencia Hotel	1132 Prospect St.
205	2	Stanton Residence	2223 "C" Street
206	1	Hubbard Residence	406 West Nutmeg St.
207		Chinese/Asian Thematic Historic District	various — see file
208		Sherman Heights Historic District	

Owners Name and Address (Summary–If Available)	Date Desig.	Other Desig.	Misc. Info.
A. Lee & Joan Estep 2120 San Diego Ave. #107 San Diego, CA 92110	10/23/86		
S.D. Historical Society P.O. Box 81825 San Diego, CA 92138	2/26/86		
Michael & Barbara London 2148 Broadway San Diego, CA 92102	5/28/86		
Bruce Kamerling c/o Historical Soc. P.O. Box 81825, 92138	9/24/86		
County of San Diego	10/22/86		
La Valencia Hotel Co.	1/14/87		
Piet & Karen Vandermack	1/14/87		
Don Cole & Jack R. Frost 406 West Nutmeg Street San Diego, CA 92103	1/14/87		
various — see file	4/29/87 5/27/87		
various — see file	5/27/87		

HISTORICAL LANDMARKS DESIGNATED BY THE SAN DIEGO HISTORICAL SITE BOARD (Continued)

Desig. No.	Grade	Historical Site or Structure	Address or Location
209	1	Marston Department Store	1050-1068 5th Ave.
210	1	McCormick/Hartfield Timberlake Christian House	1916 3rd Avenue
211	1	Quince Street Footbridge	Quince St. between 3rd & 4th Avenues
212	1	Casa de Manana — Casa Madre	849 Coast Blvd. La Jolla, CA 92037
213	2	Casa de Manana	722, 809, 825 Coast Blvd. La Jolla, CA 92037
214	2	George L. Davenport House	828-830 23rd Street San Diego, CA 92102
215	1	Sandford Hotel	1301-1323 Fifth Ave. San Diego, CA 92101
216	2: Ext. 3: Int.	Edmund F. Parmelee Residence	805 22nd Street San Diego, CA 92102
217		Grant Hill Park Historic District	Various — see file
218	1	Frank Zinnel House (see Grant Hill Park file)	643 26th Street/ 2611 "G" Street San Diego, CA

Owners Name and Address (Summary–if Available)	Date Desig.	Other Desig.	Misc. Info.
Chris Mortensen c/o Lincoln Investments 424 "F" Street 92101	6/24/87		
Trinidad Keeting 3029 Kaplua Court 92154	10/28/87		
City of San Diego	10/28/87		
Pacific Homes, Inc. 849 Coast Blvd. La Jolla, CA 92037	12/2/87		
Pacific Homes 849 Coast Blvd. La Jolla, CA 92037	12/2/87		
Al Smithson/Sam Bazile 2436 "F" Street San Diego, CA 92101	12/2/87		
Downtown Sr. Center Corp. 928 Broadway San Diego, CA 92101	12/2/87		
Diane McHenry 805 22nd Street San Diego, CA 92102	12/2/87		
Various — see file	2/24/88		
Randal McEndree P.O. Box 127362 San Diego, CA 92112	2/24/88		

HISTORICAL LANDMARKS DESIGNATED BY THE SAN DIEGO HISTORICAL SITE BOARD (Continued)

Desig. No.	Grade	Historical Site or Structure	Address or Location
219	3	Claus A. Johnson Commercial Bldg (see Grant Hill Park file)	2600 Imperial Ave. San Diego, CA 92102
220	3	Newby-Whitney House (see Grant Hill Park file)	629 2[illegible]th Street San Diego, CA
221	3	Strandlund Family Residence (see Grant Hill Park file)	402 Langley Street San Diego, CA
222	3	Italian Stone Pine (see Grant Hill Park file)	2736 "L" Street San Diego, CA
223	1	Aztec Brewery Art Work	2301 Main Street San Diego, CA
224	1	Holzwasser/Walker Scott Building	1014 Fifth Avenue San Diego, CA 92101
225	3	Citrus/Pacific Soap Factory	301 West Market St. San Diego, CA
226	1	Morgan-Larkins-Marrone Residence	7150 Monte Vista La Jolla, CA 92037

Owners Name and Address (Summary–if Available)	Date Desig.	Other Desig.	Misc. Info.
John W. & Melba Rouse 2931 "K" Street San Diego, CA 92102	2/24/88		
James L. Robinson 635 26th Street San Diego, CA 92102	2/24/88		
Dorsie R. Davis 4542 Boylston Street San Diego, CA 92102	2/24/88		
Gerardo & Evelia Guzman 2736 "L" Street San Diego, CA 92102			
Northern Automobile Co. 845 E. Missouri Ave. Suite 400 Phoenix, AZ 85005	3/23/88		
Mark Polster Accelerated Project Mgmt. 4275 Executive Square Suite 800 La Jolla, CA 92037	4/27/88		
Bernard & Miriam Flynn 2532 E. 49th Street Los Angeles, CA 90058	5/25/88		
Joseph Marrone 7150 Monte Vista Avenue La Jolla, CA 92037	5/25/88		

HISTORICAL LANDMARKS DESIGNATED BY THE SAN DIEGO HISTORICAL SITE BOARD (Continued)

Desig. No.	Grade	Historical Site or Structure	Address or Location
227	2	William Mason Fortescue Residence	3300 Third Avenue San Diego, CA
228	1	La Jolla Public Library	1008 Wall Street La Jolla, CA
229	1	The Athenaeum	1008 Wall Street La Jolla, CA 92037
230	2	Parker Office Building	7917 Girard Avenue La Jolla, CA 92037
231	1	Zenas Sikes Adobe	3672 Sunset Drive San Diego, CA
232	1	Mission Brewery/ American Agar Co	1701 Hancock Street San Diego, CA 92101
233	1	Sefton/Campbell Estate	3850 Narragansett San Diego, CA 92107
234	1	Scripps Memorial Hospital and Clinic	464, 476 Prospect St La Jolla, CA 92037
235	1	Balboa Park Fire Alarm Headquarters Building	1945 8th St. San Diego, CA (Marston Point, Balboa Park)
236	2	El Toreador Motel	631 E. San Ysidro Blvd., San Ysidro, CA 92073

Owners Name and Address (Summary–if Available)	Date Desig.	Other Desig.	Misc. Info.
Robert Caplan 3303 Fourth Avenue San Diego, CA 92103	6/22/88		
Library Assoc. of L.J. 1008 Wall Street La Jolla, CA 92037	7/27/88		
Library Assoc. of L.J. 1008 Wall Street La Jolla, CA 92037	7/27/88		
Library Assoc. of L.J. 1008 Wall Street La Jolla, CA 92037	7/27/88		
City of San Diego 202 "C" Street San Diego, CA 92101	7/27/88		
August F. Lang Foote Development Co. 5205 Kearny Villa Way Suite 211 San Diego, CA 92123	11/30/88		
Ellen C. Anewalt Trust 3850 Narragansett San Diego, CA 92107	11/30/88		
Regency Associates, Ltd 533 Coast Blvd., S. La Jolla, CA 92037	4/26/89		
City of San Diego	7/26/89		
Mondana Corporation 658 E. San Ysidro Blvd. Suite B San Ysidro, CA 92073	8/30/89		

HISTORICAL LANDMARKS DESIGNATED BY THE SAN DIEGO HISTORICAL SITE BOARD (Continued)

Desig. No.	Grade	Historical Site or Structure	Address or Location
237	1	Junipero Serra Museum	2727 Presidio Drive Presidio Park San Diego, CA 92103
238	1	Jimmy Wong's Golden Dragon Neon Sign	414 University Avenue San Diego, CA 92103
239	3	Winks/Deturi Shoe Palace Shoe Repair Neon Sign	2911-A University Ave San Diego, CA 92104
240	1	Presidio Park (Municipal Park and all other related features previously designated within the park — See Site Nos. 3, 4, 25, 35, 44 and 237)	Old Town San Diego Planned District
241	2	MacDonald/ Fowler/Mack House	3768 Albatross St. San Diego, CA 92103
242	1	Crystal Pier	4500 Ocean Blvd. Pacific Beach, CA 92109

Owners Name and Address (Summary–if Available)	Date Desig.	Other Desig.	Misc. Info.
City of San Diego 202 "C" Street San Diego, CA 92101	9/27/89		
Ahmad A. & Pari Ghamaty Zeynolabdin P. Kahnamoui John I. & Mahin Nobel 1639 Alta La Jolla Drive La Jolla, CA 92037	9/27/89		
Hillkowitz Trust c/o City Realty 3980 Park Blvd. San Diego, CA 92103	9/27/89		
City of San Diego 202 "C" Street San Diego, CA 92101	12/06/89		
John A. Waters, et. al. 2011 Garfield Rd. San Diego, CA 92110	3/28/90		
Willis M. Allen, Jr. c/o Noel Bridge Income Property 2727 Camino del Rio S. Suite 250 San Diego, CA 92108	3/28/90		

HISTORICAL LANDMARKS DESIGNATED BY THE SAN DIEGO HISTORICAL SITE BOARD (Continued)

Desig. No.	Grade	Historical Site or Structure	Address or Location
243	1	Crystal Pier Administration Building	4500 Ocean Blvd. Pacific Beach, CA 92109
244	4	Tony Bernardini Bldg.	1702-04 India Street San Diego, CA 92101
245	1	North Park Theater	2891-99 University Avenue San Diego, CA 92104
246	2	Oscar Grunert House	4679 Vista Street San Diego, CA 92116
247	4	Soledad Schoolhouse	Carmel Valley Road San Diego, CA 92120
248	2	Edwin M. Capps Residence and Site	910 60th Street San Diego, CA 92114

Owners Name and Address (Summary–if Available)	Date Desig.	Other Desig.	Misc. Info.
Willis M. Allen, Jr. c/o Noel Bridge Income Property 2727 Camino del Rio S. Suite 250 San Diego, CA 92108	3/28/90	Council Grade to approved documentation and designation	Rehab 4 and
Anthony Chappi 1321 Ft. Stockton Dr. San Diego, CA 92103	4/25/90		
City of San Diego 202 "C" Street San Diego, CA 92101	4/25/90		
Gary Beals 4679 Vista Street San Diego, CA 92116	4/25/90		
Lincoln Foster 3717 John J. Montgomery Drive San Diego, CA 92123	5/23/90		
Habitat for Humanity 701 "B" Street, Suite 201, San Diego, CA 92101	5/23/90		

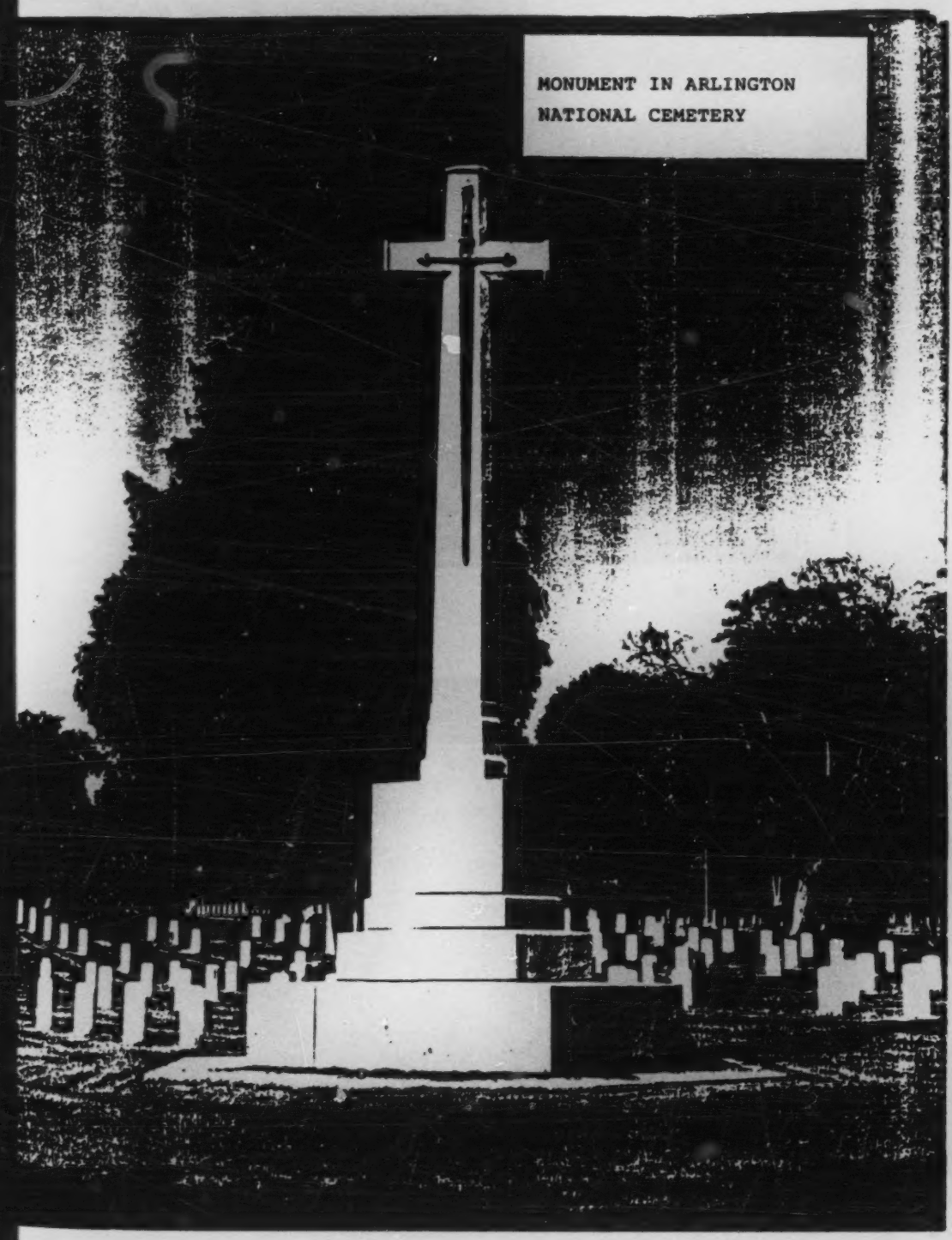
EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

APPENDIX M

MT. SOLEDAD MEMORIAL CROSS

APPENDIX N


MONUMENT IN ARLINGTON
NATIONAL CEMETERY

THE ARGONNE CROSS

ARLINGTON NATIONAL
CEMETERY
WORLD WAR I GRAVES

APPENDIX O

SUNDAY, MAY 29, 1994

The San Diego
Union-Tribune.

PARADE

Fifty years ago, on a beach not far from this ground, an event took place that changed the world forever. It happened during a great war. It happened in a place called...

NORMANDY

By James Brady

Brady, 66, ... his ... to battle ... and ... has ... to tell.

When you stand there at the German bunkers, you wonder

f the most significant actions in American military history lace a half-century ago next week, when tens of thousands of soldiers, crossing from England in a great armada of vessels, shore off rough water onto a long stretch of French seacoast. ormandy invasion, as we know it today, began the liberation free world from Adolf Hitler's murderous Third Reich. ttle less than a year, the European war would be over, and the would know of horrors that would stamp our century forever.

But the beginning of the end came with the blood of American, British, Canadian, Australian and other soldiers in the sands of Normandy in a daring, brilliant, fantastically complex maneuver whose participants will be honored in hundreds of ceremonies over the next several days.

What was Normandy like then and now? PARADE asked its columnist Jim Brady—himself a combat veteran and the author of, among other works, "The Coldest War," his memoir of the Korean conflict—to visit the beaches of Normandy. This is his report.

BY JAMES BRADY

MAHA BEACH, Normandy. On that first morning, this was the deadliest beach.

Now, 50 years after, the smooth, untracked sand and the cliffs and green fields above are still. Even the sea, the notorious English Channel, is flat and calm. It's like those wartime German communiqués: "*Im Westen nichts* all quiet on the Western Front." s quite different on D-Day. All down this long invasion coast g perhaps 50 miles, the Germans waited that June 6, 1944. They knew we were coming, but not just where nor precisely when. It must have been different, too, at sea, where the shock troops of the first wave puked up their guts, and small craft swamped and went down with all hands in a spring gale. Different, too, overhead in the black skies, where the 101st and 82nd Airborne and a division of British paratroops flew toward France.

I am here in Normandy to write about all that, sifting memory as a child sifts sand.

I begin in Caen, a big commercial town a few miles back from the coast where William the Conqueror's 1000-year-old castle still stands but where little else survived house-to-house fighting. Here is the Caen Memorial, a stunning museum of the invasion built into a cliff atop German Major General Richter's command bunker. Outside, in the breeze, the brave flags wave—one for each of the nations that fought here. Even the Germans.

Twenty miles to the west is Omaha Beach.

As I drive west, I try to put Normandy into perspective: For five years, following the collapse of Poland in 1939, Hitler's Germany has plunged Europe into a long, barbaric night of terror, privation, cruelty and death. Now, in 1944, spearheaded by the U.S. and Canada, the New World is coming to the rescue of the Old. Some 5000 ships, large and small, 11,000 planes, three airborne and five infantry divisions—nearly 160,000 men in all—will hurl themselves this June morning against the Nazis' bristling, deadly Atlantic Wall. At dawn on D-Day begins a great and decisive battle.

Yet the conflict is so vast, so ferocious, so complex that even something so dramatic as the invasion of Europe becomes but one of the war's turning points. In the East, by war's end, 20 million Russians will die in a primitive four-year bloodbath with the invading Germans. There, the turning point was Stalingrad, a ruined city even the rats have fled, where an entire German army surrendered. In North Africa, the panzers raced toward Cairo and the Suez Canal, only to be stopped at a desert crossroads called El Alamein, by an eccentric British general named Montgomery. In the Pacific, the American Navy shook off terrible wounds suffered at Pearl Harbor to ambush and bloody a huge Japanese

James Brady reflects at Normandy: How must it have felt to be one of that swarm of men hurling themselves against the deadly Atlantic Wall?

Tens of thousands of young men came to these shores to free a continent. More than 37,000 never left.

Her name is Juliette, she was 16, and she was to be married the next day—on June 6, 1944.

y Romance

ing dress, hanging near dow in a shop on Ste.-Mère- was riddled with bullets and, of speaking marriage vows, d herself running and hiding s with friends and family— all the time that her fiancé, , was dead while Allied and forces contested fiercely e ground she lived on. y, Georges survived, and the took place on June 13. Three n officers came and brought meats, pineapple and onion. to wear her second-day dress, blue one with fringes, but the had no shoes. A U.S. soldier lent her a pair, and she was photographed in them. She is 66 now, and every spring since that time, Juliette LeCambaye Brault has visited the cemetery at Colleville-sur-Mer where lie the soldiers who fought for her freedom.

June 22, 1944: A bride in soldier's shoes.

PHOTOGRAPH BY EDDIE ADAMS

ater's edge and look up at the ow anyone made it across"

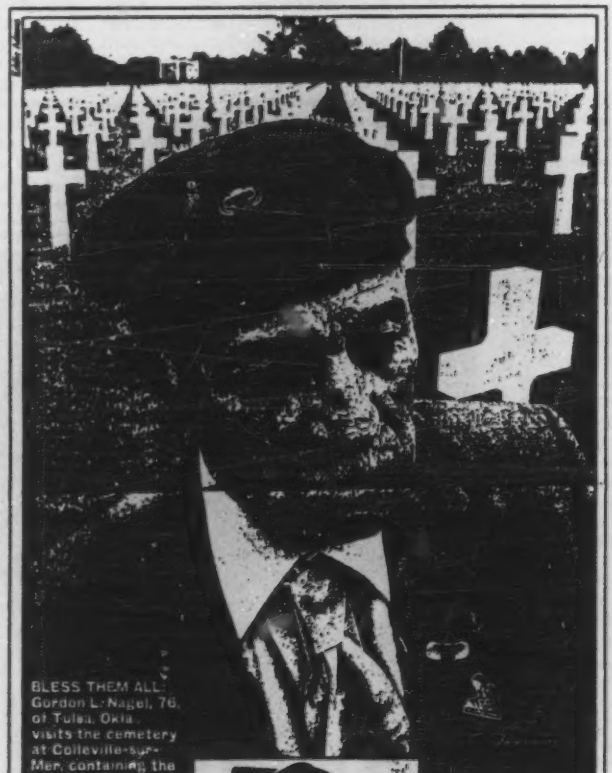
earing down on Midway Island. Italy, on June 5, the eve of D- ome fell to the Allies.

guide today is a young American Sarah Berkey, the representa- Caen of the Battle of Normandy tion in Washington, D.C. She the little red stick-shift car so can watch the country and fol- map and take notes. We start off so many lives ended—at the an Cemetery at Colleville-sur- t into high ground over Omaha where you glimpse the ocean trees.

e roll west, every village seems its little war museum, each its outlet and stone church. The is rich and rolling, good farm- spotted with black-and-white cows grazing. To an old in- an, it looks like good ground d, with nice long fields of fire to the sea, only a mile off and here are signs directing us to- maha, toward the graves. Other nt toward St. Lô, where Amer- mbers tragically massacred an troops when wind blew the moke the wrong way. Another s "College E. Hemingway," r that is, and there are lots of French, urging us to try "Oma- h Golf—27 holes."

emetery has neither walls nor u drive in and park, you walk No guards, no tours. The grass ed and edged and very green, rywhere in crisp, geometric the white headstones, cross- y, some Stars of David, set e green. It is well tended and utiful and quiet, this place of fter the war, when they built etery, next of kin were given n. Some 14,000 bodies were ome; 9386 Americans remain alk through the rows, now af- looking at the names:

ony S. Bilotty, USNR, New ne 8...Ernest A. Heeckt, PFC, a, July 10...Frank Nuzzo, 29th , Pennsylvania, June 6...Warren North Carolina, June 6, 1944." men. Who came to Europe to ntinent. And never left.



BLESS THEM ALL: Gordon L. Nagel, 76, of Tulsa, Okla., visits the cemetery at Colleville-sur-Mer, containing the graves of 9386 fallow soldiers.

SILVER STAR

Gordon Nagel, who had enlisted out of Lawton, Okla., was a 24-year-old private first class in the 507th Parachute Infantry (photo at right) when he dropped into Normandy on June 6, 1944. He won the Silver Star.

His citation, signed by Gen. Matthew B. Ridgway, tells how—as his group of 15 was withdrawing from a small orchard near Frenville, France, in the face of a superior enemy, PFC Nagel, "acting without orders to do so, and on his own initiative," covered the retreat, "keeping his machine gun in action until the enemy was only 50 yards away and on two flanks."

Nagel was to say later: "The Lord's been good to me, but He took a lot of my buddies home with Him during that war." Nagel was to jump a second time during the war, and he later carried his light machine gun during the Battle of the Bulge. Wounded four times, he also earned a Purple Heart with three clusters.

From the cemetery, you can walk down to the beach where some of these men landed, down the hill up which they fought their way. It is steep and winding and muddy, the grass slick, with rusty barbed wire and shell holes and a warning sign: "*Sanglier*"—wild boar. That's how rustic this country remains. The gravesite is as smooth and manicured as the fairways of Augusta National; the rest of it is still rough country where local peasants hunt in season and signs alert you to the dangers of digging amid unexploded mines.

I walk along the beach, the sand smooth and washed, the sea lapping gently at my boots. It could be the Jersey shore or Long Island. But when you stand there at the water's edge and look up, toward the heights—toward where the Germans had the bunkers and the guns and the advantage of shooting down—you wonder how anyone made it across that beach, you marvel that we didn't lose more.

Pointe du Hoc, where the American Rangers fought, is four or five miles farther west. The Pointe is a rocky nose about 100 feet high, sticking out into the surf. From its top, big German guns could reach both Omaha and Utah beaches with devastating enfilade fire, catching the landing craft coming in. General Eisenhower's intelligence people put a lot of value on Pointe du Hoc. And so 225 Rangers—with grapnel hooks, assault ladders and ropes—were sent to leap directly from their boats onto the rugged cliff face of Pointe du Hoc and to spike the German artillery. Only 90 Rangers got to the top and survived the fierce German attempts to throw them off the commanding height. The irony of war? There were no big guns there. Our intelligence was wrong.

I stand at the crest of Pointe du Hoc, looking down at the sea. It's a sheer cliff, difficult to climb even when they aren't slicing through your climbing ropes and firing at you and dropping grenades down the cliff face. Reinforced-concrete bunkers still stud the Pointe, linked by trenches and tunnels, and the Rangers took those too and died trying to reach imaginary guns.

continued

REMEMBERED/continued

night, over dinner in a Caen restaurant, eating oysters from the shell, I am still thinking those ponderous German bunkers and blockhouses. They built more than 12,000 such bunkers to their Atlantic coast, to protect their winnings, as it turned out. It didn't work. Young Americans and Brits and other Allies with rifles and flamethrowers and satchel charges swarmed over the bunkers and took them. Hitler's Atlantic Wall was breached. At the next table, a fellow whose face is about as rusty as mine is eating his steak and drinking wine, and I wonder if he is a salesman from Pennsylvania whose father fought here. Or perhaps a salesman from Bonn or Düsseldorf whose father manned one of those cold, gray bunkers.

There are no signs pointing the way to the German cemetery. You come upon it unexpectedly—near the village of La Cambe, along narrow National Route 13 between gray volcanic rock framing a slim gate and a memorial chapel with a wooden pew that seats two people. I mean that: There is room there for only two to pray at any one time. Beyond chapel and gate are clusters of dark Teutonic crosses on the lawn. The grass here is just as neat and green, but all else is different. Heavier and bleak, of great dignity but not as buoyant and pretty as the high ground where the Americans lie. A thin rain has come in off the Channel, and it falls as we walk around. There is no one here. Not one other person. Neither is there graffiti nor disrespect. The Germans and the French have hated each other for centuries. But they respect the dead. Here, at La Cambe, 21,160 Germans are buried.

One stone, set flat in the grass, carries the names of Konrad Kasprzyk, 20, and Heinz Stutzer, 26. Perhaps to save space, two men occupy each German grave. Two by two they marched in life, two by two they sleep in death. Along the road, Norman cows graze, unknowing.

The road to Utah Beach crosses four small bridges, spanning streams you could spit across. Yet men, mostly paratroopers, fought and died to keep these bridges from being blown up, so [illegible] tanks and trucks could get across and break out into the open country. Utah was, by comparison to Omaha, a walk in the sun. No cliffs, only gentle dunes. And here, for whatever reasons, the Germans didn't fight with the same stubborn ferocity. It was the American 4th Infantry Division that slammed ashore at Utah Beach to penetrate swiftly into the interior, linking up with the paras and glider troops. But it would take only a few days for their war to begin too, in the rugged hedgerow country not even tanks could penetrate.

Among the 4th Division casualties, a regular Army private named Matthew Brady was hit in a firefight on June 17 and taken to England, where he died four days later. He was my Uncle Matt, my father's kid brother, a young man I never knew.

Inland from Utah Beach, even in peacetime the low ground is flooded. It looks more like Holland than France, and local people wear wooden shoes called sabots. In 1944, the Germans flooded a lot more ground—General Rommel's idea. It worked. Paratroopers laden with 100 pounds of weapons and ammo and gear, tangled in silk shrouds, fell into Rommel's bogs and drowned, sometimes in as little as three feet of water. Other "sticks" of paras, entire planeloads, were blown off course and dropped into the night ocean. Few bodies were ever found.

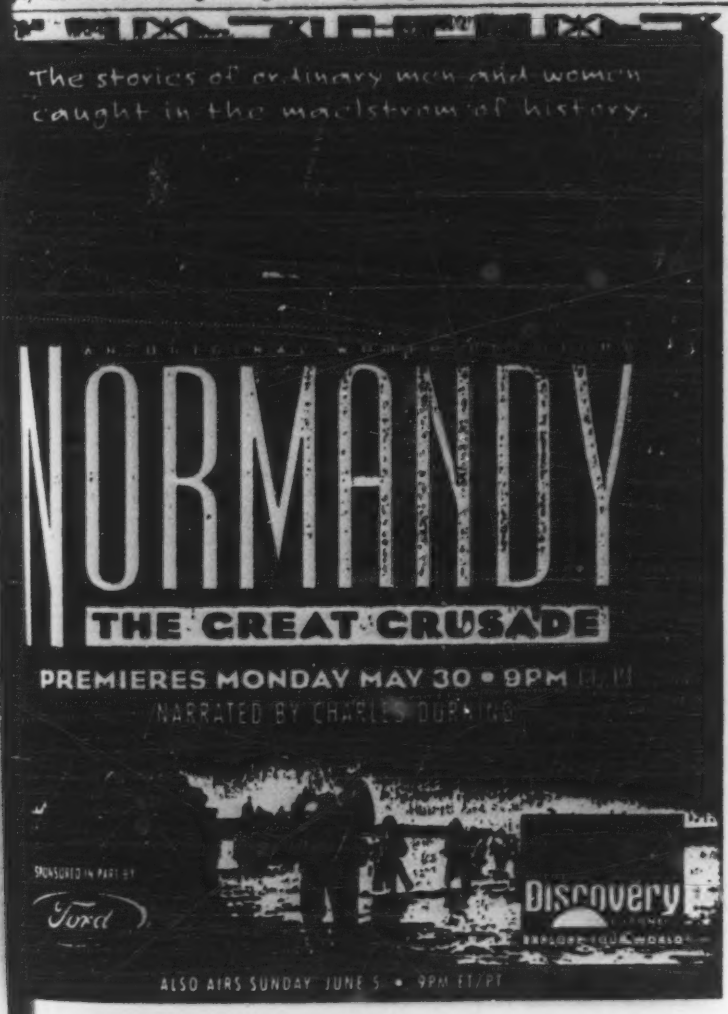
On the beaches, especially on Omaha, there were the usual foul-ups of war: Landing craft dumped assault troops in water too deep to wade; mines were supposed to have been cleared but weren't; tanks, buttoned up against German fire and rendered half-blind, rolled over dead and wounded Americans, crushing them into the sand.

Errors, too, at Ste.-Mère-Église, the little crossroads town built around a church, into which men of the 82nd and 101st Airborne dropped, only to be shot in the square by alert Germans who waited until they drifted low enough and just picked them off.

Sarah Berkey takes me inside the old church, maybe 600 years old, dark and gloomy as old churches should be, but tranquil and empty, with a few candles flickering. A place to rest, to think. We have lunch in Madame Jeanne Pentecote's little place just off the church square where the paras died, eating tough but tasty country chicken from the pot, with fresh rolls and a little of the wine of the country, while the girl who serves stirs up the fire against the damp of the day.

I sit there trying to imagine what it must have been like in the square that June night, to be a young man floating down into the cauldron. Or to have been that wounded paratrooper John Steele, hanging from the church steeple by his chute, pretending to be dead, while all about him Germans kill his friends—young strangers sent to free Madame Pentecote's little town, the first in France to be liberated after four years of Nazi Occupation.

The place names stay with you, resonating, even as the concepts—honor, glory, victory—fade. We Americans hear their echo in Bull Run, Antietam, Gettysburg, the Marne, the Argonne, Belleau Wood, the Somme...and, in my own war, Inchon and the Chosin Reservoir. So I try not to lose the old Norman names but to hold them close in memory: Ste.-Mère-Église and Utah Beach, Caen and St. Lô, the Falaise



Gap and Omaha. The Battle of Normandy raged from June 6 to Aug. 21, 1944. After 11 weeks that summer, the invading Allies counted 37,000 of their own dead and 153,000 wounded.

We drive on, a late-afternoon sun piercing the clouds, to see Arromanches, where the Allies sank concrete barges to create an artificial harbor—concrete hulks still there today, rising from the tide. And to Vierville, the first coastal town freed, near Omaha Beach, where on June 6 of this year 14 heads of state and government, including President Clinton but pointedly not Chancellor Kohl of Germany, will memorialize the D-Day dead and salute the living.

Just to the west of the harbor's little monument is a jolly establishment offering refreshments and cocktails. Then, dusk coming, we drive back to Caen, where the Germans held out for five weeks against the Brits and Canadians. The British came ashore just north of here, some units led by bagpipes.

Brave men too, as were the Danes and Free French and Poles and Norwegians and Dutch and Belgians and all the Allies. There was, on D-Day, no monopoly on courage.

Those too young to remember or unread in the histories, know little of all this: why World War II was fought or who Hitler was, or even who was on our side and who wasn't. And why millions of young Americans had to come to France to fight. So when we hear all the talk and see all the movies that will be shown and all the attention being paid over the next several days and thereafter, I think it's good. It's important to remember those who fought and died here, including my Uncle Matt. We, the survivors, are they, and they are us. A part of them dwells with us today, just as a part of us lies with them. It's a good thing that this June we will commemorate D-Day. People ought to know that long before Vietnam, before Pete Seeger, these lines could have been written:

"Where have all the young men gone? Gone for soldiers, every one.

*"Where have all the soldiers gone? Gone to graveyards, every one."**

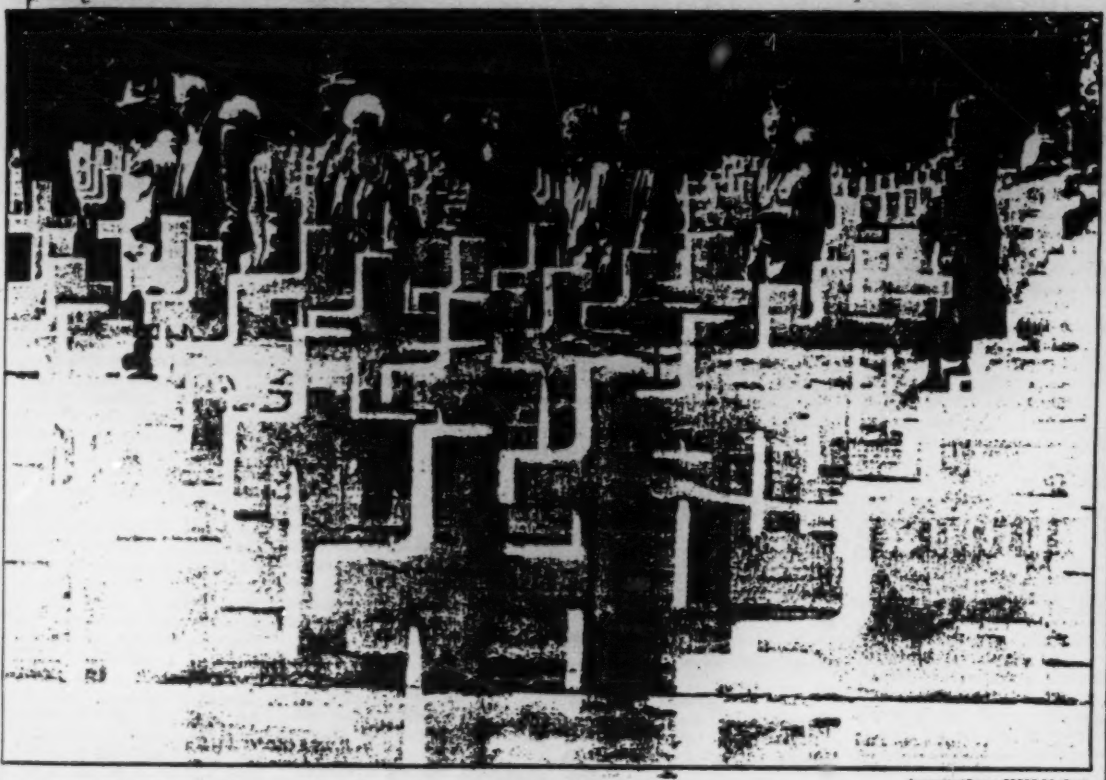
I think back to the graveyard above Omaha Beach where 9386 young Americans have gone. There they lie, row on row under the French grass, their simple white stones all aligned, all facing the same way. A nice touch that—sensible and caring. All 9386 face due west, face the Atlantic, face America.

Looking out over bloody Omaha Beach toward home.

*"Where Have All the Flowers Gone?" by Pete Seeger. Copyright ©1961 (renewed) by Sanga Music Inc. All rights reserved.

APPENDIX P

FRENCH MARK MEMORIAL DAY



Associated Press / PETER DEJONG

Tourists and World War II veterans walk through some of the 9,386 graves of soldiers buried at the American Cemetery in Colleville-sur-Mer, France. Yesterday was Memorial Day in France and many veterans came to pay their respects.

American dead shown 'honored glory'

Cemetery in Normandy draws tearful memories

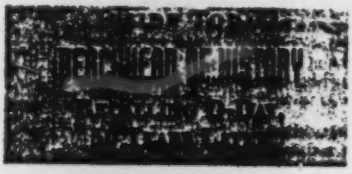
By JEANNE FREEMAN BROOKS
Staff Writer

COLLEVILLE-SUR-MER, France — High on a bluff by a deep stand of Austrian pine, where the brisk ocean wind carries the scent of roses and French tamarisk, lies Refugio Aguirre of San Diego, dead 50 years.

His white marble cross bears the date July 17, 1944.

Aguirre, like James Vinson of Oklahoma, who lies beside him, fell in the taking of Normandy in the weeks after the Allied landings on the beaches of this coastline June 6, 1944. Vinson was killed July 26.

He and Aguirre lie among 9,386 comrades



in arms in a field of grass kept vivid green by the Norman rains. This is the American Cemetery at Colleville-sur-Mer, where men who died to liberate Europe from Nazi Germany are buried in soil they fought for.

Yesterday was Memorial Day in France, and many came here to remember. They walked the cinder paths with their wives. They stood by the fragrant banks of Russian olive as the damp gusts off the water lifted their white hair.

Some fought in Normandy 50 years ago and lived to grow old. Some fought on other fronts of World War II. Many were French. All came to pay their respects — so many that, by late afternoon, cars wending their way down the narrow lane to the cemetery were bumper-to-bumper.

And beyond the gate, the pathways between the rows of marble crosses and Stars of David filled with people who paced solemnly past or stood and gazed.

Some held fluttery scraps of paper tight between their thumbs and fingers, studying the numbers — what section, what row, what grave — that told them where they would find the name they were looking for.

William Fox, 33, of Mexico City and New York, came looking for his uncle, who was

See Cemetery on Page A-18

Cemetery

French again give GI saviors tearful thanks

Continued from A-1

killed on D-Day scaling the 100-foot sheer wall of Pointe du Hoc under deadly fire.

"I'm named after him," Fox said. "My father had no other relatives and he loved his brother very much."

To Fox, born 17 years after his uncle died, "it's very inspiring to know that men would do this, go on basically a suicide mission, because it's right. It's very moving."

Robert Audinet, 65, came looking for two men he'd never known. He was bringing them flowers. Audinet, who is French, said he was doing it for his American friend, Tony Lombardi, now deceased.

In the years after the war, Lombardi had returned to Normandy twice to visit the graves of his two buddies. In a long-ago time of football games and Saturday night dates, the three once thought they'd live forever. But two died young on Utah Beach.

Audinet said he knew Lombardi would have wanted him to remember them on this day. Also, the Frenchman had come, carnations and irises in his arms, in remembrance of all the Americans who died then.

Audinet was 15 and living in nearby Valognes when "they brought us freedom. I have never forgotten, you see."

Here and there over the 172.5 acres of the cemetery are other graves decorated with bouquets of spring flowers, yellow satin ribbons and miniature American and French flags. Though it has been 50 years, these are wreaths ordered by 80 families who also have not forgotten.

The staff of the American Cemetery placed them at the base of each stone marker.

Other flowers were plainly delivered by individuals. Rob Smithson of Iowa, who died on Aug. 22, 1944, got a pot of pink begonias.

And Frank A. Bouilles of Indiana got purple irises and yellow daisies.

For Solamon Rosenbaum, a tiny American flag snaps on its stick post, inches above the grass.

Cemetery workers accompany family members to grave sites. They rub the dull ochre-colored sand of Omaha Beach gently into the lettering of the headstones and then take Polaroid photographs for the families to keep.

The sand, said Phil Rivers, superintendent, "gives a gold-leaf effect" and makes the figures more legible.

"For the families, the visits are an emotional thing," he said. "A lot of them keep it in check until they get to the headstones."

Then men, seasoned with gray in their hair and sun-worn skin, turn away abruptly, shielding their eyes as if to look off in the distance. And women fumble in their large leather pocketbooks for a crumpled wad of tissue paper.

On this French Memorial Day, four families asked to be escorted to grave sites.

That's sure to go up as more veterans pour into Normandy over the next few days for the 50th anniversary of D-Day ceremonies.

According to Rivers, 8,500 veterans have requested badges from the American Embassy in Paris to attend.

The cemetery usually receives about 1.5 million visits each year. Sixty percent of those who come are French. In 1994, the staff expects at least 2 million visitors.

They will come to kneel in the grass, like the young woman who placed a hand on a marker. Her legs seemed to give way. She stayed like that a long time, while the silver-leafed bushes behind her moved but only the sound of the surf on the beach below broke the silence.

The markers on 307 of the graves read: "Here rests in honored glory a comrade in arms known but to God." And 1,557 names are engraved on the curving wall in the Garden of the Missing. Forty-nine of the 50 states, the District of Columbia and Guam are represented. The air here is filled with the scent of roses planted in beds all around.

The words inscribed on the facing wall are: "To these we owe the high resolve that the cause for which they died shall live."

Strong men cry here.

SAN DIEGANS BURIED AT NORMANDY

Among the Americans buried and honored in the American Cemetery at Colleville-sur-Mer, Normandy, are these San Diegans, followed by the dates of their deaths:

- Pvt. Herman Addleson, June 6, 1944
- Pfc. Refugio F. Aguirre, July 27, 1944
- Pvt. Eugene A. Crestmore, July 17, 1944
- Pvt. Roy J. Gaspie, July 24, 1944
- Pvt. Berger O. Jensen, Aug. 26, 1944
- Staff Sgt. Max M. Jessen, July 11, 1944
- Pfc. Clifford E. Johnson, June 6, 1944
- Tech. 4 Carl R. Kolb, July 28, 1944
- Tech. Sgt. Roy L. Ogden, Nov. 20, 1944
- 2nd Lt. Earl L. Peters, June 17, 1944
- Sgt. James C. Pope, Aug. 3, 1944
- Pvt. James H. Poulos, July 28, 1944
- Tech. 4 Ray B. Stutt, Dec. 25, 1944
- Pvt. Rubyo R. Tellez, June 6, 1944

[illegible] are missing in action.

SOURCE: American Battle Monuments Commission

APPENDIX Q

MOUNT SOLEDAD NATURAL PARK

LEGAL DATA

1. Mount Soledad Open Space Park was dedicated July 13, 1916: Pueblo Lot #1265, owned by the City of San Diego and site of the Memorial Cross and View Site. Portions of Pueblo Lots #1252, #1253 and #1266 were added and dedicated in 1978. 40 acres of #1265 are privately owned toward the north boundary.

2. Location: Mt. Soledad and Via Capri, between Pacific Beach and La Jolla. (See City map #36.)

3. For Cite see Appendix, page 30.

HISTORICAL AND TRADITIONAL ACTIVITIES

Early accounts refer freely to Soledad, Soledad Canyon, Soledad Commons and Soledad Mountain. Many interesting, even important happenings took place at those locations, but this proposal is about Mount Soledad itself.

The history of Mount Soledad and its environs begin way back in pre-historic times — about the time when Chaldean and Egyptian civilizations were developing. Ancient hearths recently uncovered reveal that humans inhabited this area that long ago.

The 822′ height of the mountain makes it more than likely that the Spanish explorers Gaspar de Portola, Juan Bautista de Anza, and certainly Father Serra stood on the peak, it being the highest geological feature in San Diego. Can one imagine an explorer NOT climbing the highest peak in view while exploring to discover the lay of the land?

It could have been Father Serra himself who named the peak Nuestra Senora de la Soledad — Our Lady of Solitude. Soledad may also be translated as Peace, Tranquility or Solitary.

The land was first claimed by Spain, until Mexico won its independence in 1822. A stable government was established in Mexico in 1824, and Mexico briefly claimed the whole of Alta California and Baja California.

Records do not show exactly when Francisco Maria Ruiz was detailed to San Diego by Spanish authorities. Born in 1754, he became a Lt. in 1805, and Captain in 1820. He was known as a tough character with a violent temper. Poorly paid, but industrious, he may have done as many of his mates, who cut wild oats growing on the flanks of Mt. Soledad to sell in San Diego. He planted the first orchard on Soledad's slopes and lived to enjoy its fruit.

Capt. Ruiz was given the first 'Free Land Grant' after the Mexican government was free of Spanish rule; Penasquitos Canyon, where he built the Ruiz Adobe.

One source credits the following story to Capt. Ruiz, another relates: Circuit Judge Benjamin Hayes, while riding through Soledad Valley met the widow of Don Bonifacio Lopez, who was known in Old Town as "the King" because of the large number of horses he owned. Pointing to a narrow trail leading up to the top of Mt. Soledad, Mrs. Lopez said "He weighed 300 pounds, and used to gallop his horse to the top, wheel around and ride back down without breaking stride!". He prided himself in performing this feat to the delight of on-lookers on Sunday afternoons.

Fr. Fuster recorded that soldiers of the garrison planted vegetables to help feed their families and supplement their incomes.

In 1845 Americans occupied the port of San Diego. Shortly thereafter Mount Soledad and the land around its base was divided into oddly shaped lots by the Fitch Survey and labelled Pueblo lots. Though they varied in size, the average was 140 acres. A stack of mortared bricks was built for the geodetic marker. Local residents delighted in having

their pictures taken on and around the market well into the 1900s. The brick pillar was replaced with a metal button, which can now be found on the steps leading up to the Cross which now crowns Mount Soledad today. See page I.

A cross made of heavy redwood beams was dragged up the mountain in 1913 and erected by a group of private citizens. This triggered a popular move to dedicate the land as a permanent open space park, and a tradition of Services at the spot was begun.

April 24, 1916 C. D. Wood filed a petition containing twenty signatures with the City Council requesting that the southerly part of Pueblo Lot #1265, about 125 acres, be set aside as a public park. The petition was accompanied by a hand-drawn aerial map which was accompanied by the statement: "a road has recently been built to this point by private subscription by the people of Pacific Beach and La Jolla." (See Appendix for copy of the signatures, map and Petition page 9 and 10.)

The petition received speedy approval by F. M. Lockwood, Manager of Operations. Just two days later he sent a memorandum to the City Council recommending granting the petition, providing that the Common Council be allowed at all times to install reservoirs, pipe line, and roads as the Council would deem necessary." (Appendix page 11.)

Acting with extraordinary speed, ordinance No. 6670 was approved by the Mayor on July 3, 1916, effective August 3, 1916. Section 2, paragraph 3 concludes "— is hereby declared now and forever to be held in trust for the use and purpose of a public park."

Section 4 states "That all ordinances and parts of ordinances in conflict herewith are hereby repealed." (See page 12.)

The dedication took place in 1916. Pueblo Lot #1625, except for the north 40 acres became an area not subject to sale or improvement.

About the same time authorities discovered Pueblo Lot #1287, comprised of 110 acres, was purchased for $1.00 by Rudolph Schiller in 1876, but that no taxes had been paid on it until 1911 or 1912 (S. Diego Union 4/18/16).

The redwood cross was destroyed by vandals in 1923. It was quickly replaced by one built of a wood frame, wire and plaster. We call it Stucco today. It was a rallying point for Sunrise Services until a fierce windstorm blew it down in 1952.

In the 1930s Adolph Hitler was building his military machine to begin the conquest of Europe, and it became clear to our government that the United States would need to become "the arsenal for Democracy". Mount Soledad was to play an important part in several ways.

The Navy built a tower to transmit radio signals.

Authorities began training Messenger Dogs. One resident wrote that her dog, Pat, loved nothing better than to jump onto the seat of a jeep, and ride over the mountain "supervising" training of the other animals.

As war clouds gathered in the Pacific arena, the mountain became an important anti-aircraft battery station and a lookout site for Air Raid Wardens as well.

Even more interesting, the very first west coast Heliograph Station was built on Mt. Soledad to flash messages to Catalina, and on up the coast to Washington State, a resource which would be needed if the Japanese invaded our west coast and normal message routes would be interrupted. Fortunately the need to use the system never arose. (Source Los Angeles Times 8/03/85 story by Nancy Ray).

The first Television Program ever broadcast in San Diego County came from a transmitter on Mount Soledad. It was KFMB in 1943. KOGO also transmitted from the site. (Engstrand, S.D. Cornerstone. P 136.)

World War II ended in August of 1945, and all was relatively quiet on Mt. Soledad until March 13, 1952 when a fierce windstorm blew down the stucco cross.

The traditional Sunrise Service was held beside the downed cross. It was sponsored by American Legion Post #275, assisted by Post 552 of Pacific Beach; Post #6, San Diego; North Island Post #753; Dewitt C. Michell Post #201; San Diego Downtown Post #492; and La Mesa Post #282. (See Appendix page 13.)

The Commander of the La Jolla American Legion reported their switchboard had been swamped by calls from workers and donors eager to help replace the wind-damaged cross during the following week.

If there have been doubts about the purpose of the present cross as a Memorial to American War Dead, Incorporation, granted to The Mount Soledad *Memorial* Association, Inc. by California State, along with Tax Free status granted by the Franchise Tax Board on April 28, 1952 should prove reassuring. (See page 29.)

Permission to proceed with replacement plans was granted by the City Council (Documents 449251 and 452634.)

Contributions came from all over the County, including American Legion Posts #275, $433, and #434. Other early supporters included Walter Dewhurst, contractor; Myrtle Hoffelter, sec. of Mt. Soledad Assn; Don Campbell, architect; who donated his services; Col. Hugh Miller, Pres. of Mt. Soledad Memorial Assn., Inc.; James Copley, Margaret Goldwater, sister of Barry Goldwater; Helen Geisch, Jessup and Sons, jewelry; William and Florence Kellogg, owners of

La Jolla Beach and Tennis Club; Mrs. Florence Scripps, Milton Sessions, brother of Kate Sessions; Bernard and Carmelita Swarts, active in Park development. (see Appendix for a more complete list of contributors, pages 15, 16, and 17.)

July 1, 1953 the San Diego City Council passed a resolution approving the project and issued a permit. Conditions stipulated that the Memorial Association would: 1. Build the memorial using public donations; 2. Prove the Association could complete the project; and 3. be responsible for maintaining it after completion. (Page 18.)

Slightly more than two years later the present cross, designed by Architect Don Campbell was dedicated on Easter Sunday, April 18, 1954.

A newspaper account of 1954 dedication plans filled nearly two full columns. I quote: "Admiral Thorton Miller, 11th Naval District Chaplain will dedicate the Cross to the memory of all those who have given their lives in the nation's wars." (Appendix p. 19.)

The spectacular, sturdy stone cross, so ably designed by Don Campbell was the subject for a weekly business calendar. Probably that was in 1955. The file clipping contains no exact date, just the picture. The reverse side was for the week of March 20. (Pages 22 and 23.)

The road between Pacific Beach and La Jolla was reconstructed connecting Muirlands in La Jolla with Pacific Beach.

Sunrise Services on Easter have been a tradition lasting for 69 years, right up to the present. They were sponsored by the La Jolla Town Council, assisted by various towns and branches of the Navy and Marine Corps, which supplied such things as chairs, loud speakers, and music. Recent services, always non-denominational, have been sponsored by the Mount Soledad Memorial Association. Attendance

has grown each year, and Korean Vets are now included. (See page 24).

In 1954 Architect Pat Paderweski built a home next to the Cross and the towers built there — one for the Navy, one for Station KFMB, and the third was used by KOGO. Mr. Paderweski had to contend with a dirt road, and no running water. To solve his problem, each week he laid a plastic pipe over the road and filled his water tank from a fire hydrant between the hours of 12:00 and 3:00 A.M., fervently hoping no one would drive over and break it!

The beautiful seven-foot high iron fence which now surrounds the spectacular Memorial Cross once surrounded the very first palm tree ever planted in San Diego. The original palm, planted by Father Serra died. On May 7, 1958, Les Holcomb, asst. City Manager announced the fence had been declared surplus, and would be moved to the Historical Site on Mount Soledad. There it still stands, erect and in good repair.

October 1, 1963 Fred R. Rhodes, manager of Operations for the City of San Diego, wrote a letter recommending the joining of roads between Pacific Beach and La Jolla.

The La Jolla Light reported 5/14/81 a debate over a link-up of La Jolla Scenic Drive North with La Jolla Scenic Drive South; stating the Soledad Mountain Memorial Cross had long been a focal point for La Jolla sight-seeing, because of the 822′ altitude of the mountain and the 43′ of the Cross itself, as well as the panoramic view.

A wooden sign, stating "Mt. Soledad Park, a natural park of the City of San Diego" was erected in 1984, through joint efforts of the Mt. Soledad Memorial Assn. President Ruth Smith, and William Kellogg, owner of the La Jolla Beach and Tennis Club.

The Memorial Cross has been a popular site for outdoor Weddings and other events, without charge as recently as 1988.

A bronze sign, briefly telling the history of the cross has been cast; paid for by City Beautiful and the Mt. Soledad Memorial Assn., Inc. It awaits final approval and erection by the City Park Dept.

A Candelighting service honoring the POWs (Prisoners of War) and MIAs (Missing in Action) was a recent public ceremony held at the base of the Memorial Cross on September 16, 1989. (See Appendix page 26 and 27.)

The first President of the Mount Soledad Memorial Association was Col. Hugh Miller, second was Don Campbell, third Ruth Smith, and the present President is William Kellogg, mentioned previously.

In June of 1989, Stephen Thorne, President of the local chapter of American Atheists filed a suit to have the cross removed.

Former San Diego Councilperson Helen Cobb researched the problem. She found a similar case in Eugene Oregon, which was sent to the U.S. Supreme Court. The Court ruled "Memorial Markers, including Crosses, could remain on Government Property. (See Bibliography for Cite.)

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No. _____

In The

Supreme Court of the United States

October Term, 1993

CITY OF SAN DIEGO,

Petitioner,

v.

PHILIP K. PAULSON, HOWARD T. KREISNER & SOCIETY OF SEPARATIONISTS, INC.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF THE STATE OF CALIFORNIA ON BEHALF OF PETITIONER THE CITY OF SAN DIEGO

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QUESTIONS PRESENTED

I. Should federal courts abstain from determining unsettled questions of state constitutional law?

II. Is a passive historical structure with religious connotations violative of a state constitutional clause that has not been definitively interpreted by state courts?

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I

INTRODUCTION

Amicus Curiae State of California ("California") submits that the ruling of the Court of Appeals that the Mt. Soledad Memorial Cross violates the California Constitution should be reversed on two grounds. First, the lower court should have abstained because at issue is an unsettled provision of the California Constitution and the State should have the opportunity to interpret its own constitution. Second, the Court of Appeals erred in rejecting the importance of the public policy of historic preservation that both the State of California and The City of San Diego have implemented. If the Ninth Circuit order stands, numerous historic sites throughout the state will be threatened with destruction.

II

INTEREST OF AMICUS CURIAE

The State of California has a particularly strong interest in this case. First, it is the State's constitution that is at issue. As the Chief Justice of the California Supreme Court has emphasized, state courts are the final arbiters of the provisions of state constitutions. By construing an unsettled provision of the State constitution, without allowing the State courts to rule, the appellate court has deprived California of the vital power over its own constitution.

California has an important public policy to foster historic preservation, including public ownership of historic sites, regardless of the popularity each artifact may

currently possess. It cannot be emphasized too strongly that California has a strong interest in avoiding a judicial determination that would countermand this policy and impede protection of important State historical sites.

III

ARGUMENT

A. California Courts Should Have the Opportunity to Interpret Unsettled Clauses of its Own Constitution

As discussed in Petitioner City of San Diego's Petition for Certiorari, the interpretation of the California Constitution's "no preference" clause is unsettled. California should have the first opportunity to interpret the language of that clause in relation to this case. The Court of Appeals should have abstained. California joins in Petitioner's argument and presents its own perspective.

1. The "No Preference" Clause is Unsettled

The only two current decisions by the California Supreme Court dealing with the "no preference" clause demonstrate no unanimity as to exactly what constitutes a violation of that section. In *Fox v. City of Los Angeles*, 22 Cal. 3d 792 (1978) the court issued a seriously divided opinion. Not only did Justices Richardson and Clark dissent on the basis that the illumination of a cross from a city building did not violate the state and federal constitutions, but each of the three opinions expressed a different view as to whether the California Constitution compelled the majority view that the display was constitutionally prohibited. *Id.*, at 822-25, dissent of Clark, J.; at

813-22, dissent of Richardson, J.; at 799-813, concurring opn. of Bird, C.J. While the 4-justice plurality opinion appears to rely exclusively on the "no preference" provision of article I, section 4, of the California Constitution, Chief Justice Bird relies on both Constitutions without indicating whether the state constitution is broader or more protective that the federal provision. Id., at 806-07. Justice Clark, on the other hand, correctly noted that the 4-justice plurality opinion utterly fails to explain the state constitutional violation in the illumination on the city building. Id., at 824-25. No uniform view as the meaning and applicability of the state constitutional "no preference" clause appears in Fox.

In *Sands v. Morongo Unified School District*, 53 Cal. 3d 863 (1991), *cert. denied* 112 S. Ct. 3026 (1992), another confusing opinion, the court expressed divergent views on the relevancy of the federal and state constitutions to this issue.

> As a result of the various opinions filed in this case, three justices have concluded that the practice violates our state constitution, two have concluded that it does not, and two (myself included) have declined to reach any state constitutional issues. Therefore, our judgment does not rest on the state constitution; any resolution of the state constitutional issues will necessarily await another day.

Id. at 902 (Lucas, C.J., concurring).

Hence, the Ninth Circuit's ruling on this case directly contradicts one of the basic tenets of *Pullman* abstention: that an issue of unsettled state law should be decided by

the state before the federal courts become involved. *Railroad Commission of Texas v. Pullman*, 312 U.S. 496, 499 (1940).

The Court of Appeals erred in assuming that *Pullman* abstention was not warranted on the ground, as it noted, "[h]ere, we have interpretive caselaw." *Ellis v. City of La Mesa*, 990 F.2d 1518, 1522 (9th Cir. 1993). As demonstrated, state court interpretive caselaw concerning the "no preference" provision of the state constitution is unsettled as any one clause could be. As this case involves not the active and seasonal illumination of windows in a city building or the giving of a prayer in a school ceremony, but the passive presence of a structure which has some religious (as well as other) meaning, the legal significance of this object under *state* constitutional law is not something "that a federal court [can] predict with any confidence . . . " *Pearl Inv. Co. v. City and County of San Francisco*, 774 F.2d 1460, 1465 (9th Cir. 1985).

Additionally, the Court of Appeals announced it perceived no "special circumstances" so as to warrant *Pullman* abstention. *Ellis*, at 1522. These circumstances apply where the state law is susceptible of a construction by the state judiciary that would avoid or modify the necessity of reaching a federal constitutional question. *Kusper v. Pontikes*, 414 U.S. 51, 54 (1973). Certainly, here, the state judiciary is capable of reaching a conclusion or settling the relevant principles that would apply to these facts, without reaching the federal constitutional questions. Given these circumstances, it is not appropriate for the federal court to decide the unsettled questions of state

constitutional law, when that is precisely what can and should be done by the state court.

2. California Courts Should be Permitted to Interpret the California Constitution

As noted in the Petition for Certiorari, the case law is clear that where state law is uncertain, federal courts should abstain and allow the state courts to interpret the language in question before they rule on the issue. *Askew v. Hargrave*, 401 U.S. 476, 478 (1971). "The Pullman doctrine was based on the 'avoidance of needless friction between federal pronouncements and state policies. The instant case is the classic case in that tradition, for here the nub of the whole controversy may be the state constitution." *Reetz v. Bozanich*, 397 U.S. 82, 87 (1970) (citations omitted). California respectfully submits that the federal district court should have abstained and allowed the state courts the first opportunity to interpret this important constitutional provision.

B. The Ninth Circuit's ruling, if upheld, threatens the very existence of historical treasures which it is the policy of California to protect.

The California legislature has expressly declared the importance of California's public policy of historic preservation. "The Legislature . . . finds and declares that . . . [c]ities, counties, and districts must exercise constant vigilance to see that the . . . historical resources they now have are not lost to other uses." Cal. Pub. Res. Code 5096.113(h). Such preservation includes public ownership of historic sites as well. "It is in the public interest

for the state to acquire, develop, and restore areas for . . . [historic] preservation and to aid local governments of the state in acquiring . . . such areas." Id.

The fact that the City's Historical Site Board has designated the landmark as an historical site, adds weight to Petitioner's argument. "We decline to second guess the agency's expert determinations . . . since there is adequate support for those conclusions in the record." *Association of Pacific Fisheries v. Environmental Protection Agency*, 615 F.2d 794 (9th Cir. 1980).

If the ruling of the Ninth Circuit is allowed to stand, not only this landmark, but other similar historic sites on public land throughout the State are in jeopardy. Numerous historic religious sites on public property across the state are threatened by the appellate court's ruling, including:

- The first Jewish synagogue in San Diego
- The Fr. Junipero Serra Cross site
- A Chinese temple
- A Methodist church
- The Los Flores Chapel
- The Yosemite Valley Chapel
- The Estrella Adobe Church
- The Mormon Trail Monument

As Petitioner argued in its Petition for Certiorari, a governmental entity's actions to preserve historic sites, including those similar to the Mt. Soledad Cross, cannot reasonably be said to show preference for or to establish

any religion. California emphatically joins in Petitioner's argument.

IV

CONCLUSION

California respectfully and urgently requests that this Court grant certiorari and overturn the Ninth Circuit's erroneous ruling, or, in the alternative, remand this case with directions that it should be heard in state court.

DATED: June 14, 1994

Respectfully submitted,

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No. 93-2013

In the SUPREME COURT of the UNITED STATES

CITY OF SAN DIEGO,
Petitioner,
v.
PHILIP K. PAULSON, HOWARD T. KREISNER,
& SOCIETY OF SEPARATIONISTS,
Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly followed the guidance of state courts in holding that the prominent display of a Latin cross in a public park violates the California constitution.

2. Whether *Pullman* abstention is required when federal courts consider a claim arising under a state constitutional provision that has been interpreted by state courts in analogous, but not identical, factual contexts.

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Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

Respondents Philip K. Paulson and Howard T. Kreisner respectfully submit this brief in opposition to the petition for writ of certiorari.

STATEMENT OF THE CASE

Defendant/petitioner, the City of San Diego, seeks a writ of certiorari to review a decision of the United States Court of Appeals for the Ninth Circuit affirming the district court's grant of summary judgment to plaintiffs/respondents. Respondents' suit challenges, as violations

of the constitutions of California and the United States, petitioner's use of public park land to display a large Latin cross at the summit of Mt. Soledad, the highest point in the City. The decision below rests exclusively on state constitutional grounds.

I. Factual Background of the Mt. Soledad Easter Cross

Since 1916, the City of San Diego has owned a 170-acre public park located on Mt. Soledad, the highest point in the city. The first cross on Mt. Soledad was constructed of wood in 1913 and was destroyed by vandals in 1923. A replacement was built of wood and stucco in 1934. This cross was destroyed during a storm in 1952. Later that year, a group of citizens secured permission from the San Diego City Council to construct a Latin cross at the summit of Mt. Soledad. Using 24 tons of reinforced concrete, the 43-foot structure was completed in 1954. All three crosses were intended to serve as settings for annual Easter sunrise services by Christian religious groups. Appendix to Petition for Writ of Certiorari (hereafter "P. App."), at D-4, F-3.

The present cross is commonly known as the "Easter Cross" and many maps show this name. To illustrate, the most recent San Diego map of the American Automobile Association (1992 edition) designates the cross as the "Soledad Mtn. Easter Cross." Respondents' Appendix at A (hereafter "R. App.") San Diego residents and visitors alike identify the Mt. Soledad cross with Easter.

The cross was originally dedicated by its sponsor, the Mt. Soledad Memorial Association, at a Christian religious service on Easter Sunday in 1954. On every Easter since, the Association has sponsored a sunrise service. P. App. at D-4, 5.

The most recent observance at the cross took place on Easter Sunday, April 3, 1994. A newspaper announce-

ment of this service, listing the program and participants, leaves no doubt that this was an exclusively Christian event. R. App. at B. This sunrise service was sponsored by the Mt. Soledad Memorial Association and featured a reading of the poem written for the dedication of the present cross in 1954. That poem (R. App. at C) begins as follows:

> "In reverent humility
> We dedicate this cross to Thee
> O Christ . . . . "

Respondents note that the City's petition does not include the word "Easter" or any mention of the Easter sunrise services conducted each year at the site of the Easter Cross.

2. The City's "Historical Structure" Argument

In its petition, the City repeatedly refers to the Easter Cross as an "historical structure" or monument. From the Questions Presented to the Conclusion of the petition, that phrase or its analogues are used eight times. This Court is beseeched to grant the petition because "the irreplaceable historical treasures of this country would be at risk of destruction" if the decision of the Court of Appeals is not reversed. Pet. at 23. The City's "historical structure" claim, however, has been newly constructed to replace its original (and unsuccessful) defense of the Easter Cross. In argument before the district court, the City characterized the cross as a completely secular "war memorial," and defended it solely on that ground. However, the court ruled that this characterization was a "pretext" to mask the sectarian religious purposes of the Easter Cross. P. App. at F-38.

Anticipating this ruling, the City changed its approach. Shortly after oral argument in the district court, the City moved to designate the Easter Cross and the sur-

rounding park as a "historical site." P. App. at K 1-2. Contrary to the City's assertion that this decision was "based upon input which pre-dated the instant litigation," Pet. at 5, the record shows that this effort began after and was prompted by the filing of the instant "suit to have the cross removed." P. App. at Q-8. The City's attorneys provided assistance to the private citizens who prepared the request to the City's Historical Site Board. Two months after the summary judgment arguments in the district court, the Board provided the requested "historical site" designation.

Respondents note the above facts because the City's characterization in its petition of the Easter Cross as an "historical structure" was not before the district court at the time of summary judgment argument, nor was it addressed by the court of appeals. In any event, the question of whether a cross which was erected just forty years ago is truly "historic" is less important than the sectarian purposes of those who erected it.

Respondents additionally note the City's claim, also made eight times in its petition, that the Easter Cross is "owned" by the Mt. Soledad Memorial Association. The point of this claim seems to be that "private" ownership of the cross protects it from the "governmental entanglement" prong of the *Lemon* test employed by this Court in Establishment Clause cases, *Lemon v. Kurtzman*, 402 U.S. 602 (1971). Pet. at 8-9. Although this case was decided without reference to the Establishment Clause, the City has raised the issue in its petition and respondents feel constrained to reply that the question of who "owns" the Easter Cross is controverted, as the Court of Appeals noted. P. App. at C-6. This question will be considered by the district court in subsequent proceedings to enforce its injunction, and need not be considered by this Court. Additionally, whether the Easter Cross is "owned" by a private group or by a public entity is irrelevant to the legality of its permanent placement in a public park.

II. Proceedings Below

The district court granted respondents' motion for summary judgment based on its determination that the Mt. Soledad cross violated the No Preference clause of the California Constitution, which guarantees the "free exercise and enjoyment of religion without discrimination or preference. . . ." Cal. Const., Art. I, sec. 4; P. App. at F-38. In view of that ruling, the court declined to reach respondents' remaining federal constitutional claim, or claims based on other provisions of the California Constitution. P. App. at F-13.

The Court of Appeals for the Ninth Circuit affirmed on state constitutional grounds alone. P. App. at D-10. The court carefully considered and rejected petitioner's contention, based on the doctrine set forth in *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941), that adjudication by the district court of respondents' claim under the No Preference clause was an abuse of discretion. P. App. at D-8, 9.

SUMMARY OF ARGUMENT

The Questions Presented in the petition as grounds for issuance of a writ are closely related. First, the City argues that the Court of Appeals erred in its application of "a state constitutional clause that has not been definitively interpreted by the state courts"; and second, that *Pullman* abstention should be applied and this case remanded to state court. Petition at i.

These related grounds for review fail to satisfy the standards for exercise of the Court's discretionary jurisdiction, as stated in Supreme Court Rule 10.1(a). Quoting that rule, petitioner claims that the Court of Appeals "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Pet. at 19. With due re-

spect, respondents suggest that petitioner has substituted hyperbole for reasoned argument.

1. In affirming the district court's grant of summary judgment to respondents, which was based on the No Preference clause of the California Constitution, the Court of Appeals followed the clear guidance of the state courts in construing this clause. An extensive body of California case law, including a previous challenge to a Latin cross on public property, makes clear that the Easter Cross in Mt. Soledad Nature Park constitutes a "preference" for the Christian religion.

2. In affirming the district court's decision to adjudicate respondents' claim, the Court of Appeals applied the settled rule that federal courts need not abstain under *Pullman* if they can predict with any confidence how a state court would resolve the matter. As noted above, and discussed below, the extensive body of California case law construing the No Preference clause, dating back more than a century, provided the Court of Appeals with ample guidance in this case. The court's reasoning on the abstention issue is consistent with the uniform body of case law interpreting the *Pullman* doctrine, and thus presents no conflict with other circuits that might justify this Court's review.

REASONS FOR DENYING THE PETITION

I. California Case Law Provides An Ample Basis For The Decision Of The Court Of Appeals

Petitioner claims that the Court of Appeals erred in its interpretation of the No Preference clause of the California Constitution, because "[s]tate law in this area is unsettled." Pet. at 6. On the contrary, state law is well settled and was carefully analyzed and followed by the Court of Appeals. Perhaps conscious of this fact, the City devotes less than two pages of its petition to the Califor-

nia cases that were discussed on virtually every page of the opinion below. The petition glosses over the leading case, *Fox v. City of Los Angeles*, 22 Cal. 3d 792 (1978), in just eleven lines, focusing on the irrelevant issue of whether the display on Mt. Soledad of other religious symbols might somehow cure the Easter cross of "preference" for the Christian religion. Pet. at 7.

In contrast to petitioner's effort to ignore *Fox*, it was cited or referred to eight times by the Court of Appeals and thirteen times by the district court. The reason for this judicial reliance on *Fox* is evident in the factual similarities of the two cases, which petitioner evades. In *Fox*, the California Supreme Court ruled that display of the Latin cross on Los Angeles City Hall, by illuminating windows at night during both the Christmas and Easter holidays, exhibited a forbidden "preference" for the Christian religion. The *Fox* opinion cited the trial court finding that the lighted cross on City Hall "is visible for many miles in many directions, and can be and is viewed by persons driving the freeways" that pass City Hall. 22 Cal. 3d at 794.

Similarly, the Court of Appeals held that the Mt. Soledad cross "can be seen from a substantial distance, including a portion of the interstate highway" that passes within one-half mile of the cross. P. App. at D-4. The cross in *Fox* was displayed only at night and only during a few religious holidays, while the Mt. Soledad cross is a permanent fixture, visible every day of the year to passing motorists as well as visitors to Mt. Soledad Nature Park.

The petition cites just once and devotes only seven lines to the second leading state case, *Okrand v. City of Los Angeles*, 207 Cal. App. 3d 566 (1989), which held that the display of an unlit Jewish menorah in the rotunda of Los Angeles City Hall, near a decorated Christmas tree, did not violate the No Preference clause. The facts in *Okrand* are virtually identical to those in *County of Allegheny v. ACLU*, 492 U.S. 73 (1989), decided by this Court

later in the same year and with much the same reasoning. The relevance of *Okrand* to this case, recognized by thirteen citations by the Court of Appeals and fifteen by the district court, lies primarily in its common-sense holding that the Latin cross "represents with relative clarity and simplicity the Christian message of the crucifixion and resurrection of Jesus Christ, a doctrine at the heart of Christianity." *Okrand, supra,* at 579-580. As the record makes clear, the Mt. Soledad Easter Cross was erected for the primary purpose of expressing this central Christian doctrine.

Finally, the petition dismisses the Ninth Circuit opinion in *Hewitt v. Joiner*, 940 F.2d 1561 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 969 (1992), in nine lines and denounces the Court of Appeals for "concocting" in that case what the City disparages as "its own 'law'" on the No Preference clause. In fact, the Court of Appeals in *Hewitt*, which involved the permanent display of Christian statuary in a county park, carefully analyzed the *Fox* and *Okrand* opinions and applied their holdings to each significant aspect of the *Hewitt* case. In similar fashion, the Court of Appeals and the district court both applied the *Hewitt* analysis to the Mt. Soledad Easter Cross and concluded that permanent display of the Latin cross in a public park violates the No Preference clause of the California Constitution. P. App. at D 16-18, F 38.

Respondents consider it significant that petitioner has barely mentioned the leading state cases, and the most relevant Court of Appeals opinion, although they provide clear guidance on the interpretation of the No Preference clause of the California Constitution. The petition devotes twice as much space, and nineteen case citations, to arguing that the Mt. Soledad Easter Cross does not violate the Establishment Clause of the federal Constitution. Pet. at 8-12. This argument is both specious and irrelevant, since it is clearly erroneous and was not relied upon by the courts below. Respondents note only that the Mt. Soledad Easter Cross would obviously fail

the second part of the *Lemon* test, to which petitioner adverts, Pet. at 8, because it advances a particular religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971). Similarly, the City's claim that the Easter Cross was erected for the "secular purpose" of honoring veterans was considered and dismissed by the district court, which held that the *Lemon* test did not apply and that "the presence of a secular purpose [under the *Lemon* test] is irrelevant" to application of the No Preference clause. P. App. at F-18, n. 25. Consequently, the City's effort to raise claims that were not considered or decided by the courts below should be dismissed by this Court.

II. The City's Effort to Distinguish *Allegheny County* Fails

Respondents will respond briefly to one of the City's more insubstantial arguments. The City claims that the Easter Cross "is located in a public park approximately 13.5 miles from San Diego City Hall" and that its "distance from the seat of government strengthens the argument for the constitutionality of the cross." Pet. at 4. The petition then cites this Court's decision in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) for support. Although the petition does not quote it, the City's argument on this minor issue presumably refers to Justice Kennedy's statement in his *Allegheny County* opinion that the Establishment Clause "forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall." Id. at 661.

The City obviously hopes to distinguish *Allegheny County* from the instant case. This effort fails for two reasons. First, the Easter Cross is not "13.5 miles from San Diego City Hall." This supposed fact is based upon an affidavit from one of the City's attorneys, who measured the distance with her automobile odometer, driving around city streets, freeways, and the circular approach road to Mt. Soledad Nature Park. P. App. at I.

This affidavit is hardly deserving of judicial notice, let alone judicial interest. The Easter Cross is actually 9.5 miles from City Hall, by straight-line measurement. More to the point, San Diego City Hall is a nondescript downtown building, the roof of which cannot be seen from the street below, while Mt. Soledad is the dominant physical feature of the city, from which the Easter Cross can be seen for many miles. A more appropriate quotation from Justice Kennedy's *Allegheny County* opinion is his comment that the constitutional vice of a large Latin cross on a public facility is that "such an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion." The Mt. Soledad Easter Cross is indisputably "an obtrusive year-round religious display" of a sectarian symbol. Id.

III. Because State Law Is Settled In This Area, *Pullman* Abstention Is Not Required

Following its argument that state law on the No Preference clause of the California Constitution is "unsettled," Pet. at 6, the City devotes the bulk of its petition to the claim that the federal courts below should have applied *Pullman* abstention and directed respondents to state court. As shown above, state law in this area is well settled; consequently, *Pullman* abstention is not required.

Again with due respect, respondents suggest that petitioner has substituted hyperbole for reasoned argument on this issue. The City claims that the decision below "creates an intolerable tension between state and federal courts." Pet. at 12. The rhetoric then heats up. The failure of this Court to apply *Pullman* abstention "will send a signal that the federal courts may ride roughshod over the rights of states to interpret their constitutions in the way they see fit." Pet. at 14. Disaster impends. If this Court fails to apply *Pullman* abstention, the consequences "would indeed be tragic" and "the irreplaceable

historic treasures of this country would be at risk of destruction." Pet. at 5, 23.

Nothing of the sort will happen. The Washington Monument and the Statue of Liberty will remain standing after the Easter Cross is removed from the summit of Mt. Soledad. Most likely, the City will replace the cross with an appropriate memorial to veterans that does not convey a sectarian religious message. The *Pullman* doctrine affords the City no relief from the decisions of the lower courts.

The Court of Appeals correctly ruled in this case that "*Pullman* abstention is appropriate where the state's constitution contains a provision *unlike any* in the federal constitution and state court construction of its unclear or ambiguous clause might make a federal ruling unnecessary". P. App. at D-6 (emphasis added). The Court of Appeals cited for this proposition this Court's decision in *Reetz v. Bozanich*, 397 U.S. 82 (1970), a case also cited by petitioner, Pet. at 22. The *Reetz* case, in fact, answers the abstention question in the instant case. This Court stressed in *Reetz*, which involved a provision of the Alaska Constitution dealing with fishing rights, the "unique" nature of this provision. 397 U.S. at 87.

In contrast to *Reetz*, there is nothing "unique" about the No Preference clause of the California Constitution. It closely resembles the Establishment Clause of the federal constitution, and California courts have looked to this Court's decisions in Establishment Clause cases for guidance in construing the No Preference clause. *Fox v. City of Los Angeles, supra; Okrand v. City of Los Angeles, supra.* Petitioner even concedes that the two clauses are "similar" in form and function. Pet. at 14. Consequently, the ruling of the Court of Appeals that California courts have provided "interpretive caselaw" on the No Preference clause has ample support, as does its rejection of the City's request for *Pullman* abstention. P. App. at D-7.

IV. The City's "Free Speech" Claim Has No Merit

The City raises in its petition, for the first time, the claim that removal of the Easter Cross will somehow abridge the "free speech" rights of the Mt. Soledad Memorial Association. This argument is brief and somewhat murky, but it apparently rests on the claim that the Mt. Soledad Nature Park is a "traditional open forum" in which the Memorial Association has a First Amendment right to "display its cross" as an exercise in "symbolic expression" of religious views. Pet. at 10-11.

This argument is totally without merit. Respondents concede that members of the Memorial Association have the right to conduct Easter sunrise services in the Nature Park, or elsewhere on public land, subject to normal and nondiscriminatory regulations. They may even bring a cross with them as a backdrop for such services. They do not, however, have a First Amendment right to construct and maintain a large, permanent structure with obvious sectarian meaning in that park. To hold that they have such a First Amendment right would authorize any political or religious group to erect its own symbol, of equal size and prominence, on public property. The answer to this question is so obvious that citation to authority is unnecessary.

The City asks this Court to decide this question even though it admits that the "free speech argument was not raised below." Pet. at 11. It quotes, however, from a decision that upheld this Court's "power to decide important questions not raised by the parties," citing *Blonder-Tongue Laboratories Inc. v. Univ. of Illinois Foundation*, 402 U.S. 313, 320 n. 6 (1971), and *Vance v. Terrazas*, 444 U.S. 252, 258-59 n. 5 (1980). Neither citation is relevant to this case. *Blonder-Tongue* and *Vance* both involved this Court's decision to rule on questions not presented in petitions for certiorari. The City has raised the "free speech" claim in its petition. The proper rule is that this Court's "normal practice . . . is to refrain from addressing issues not

raised in the Court of Appeals." *Equal Employment Opportunity Comm'n v. Federal Labor Relations Authority*, 476 U.S. 19, 25 (1986). *Accord, Adickes v. Kress & Co.*, 398 U.S. 144, 147 (1970)("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") There is no reason in this case to depart from that salutary rule.

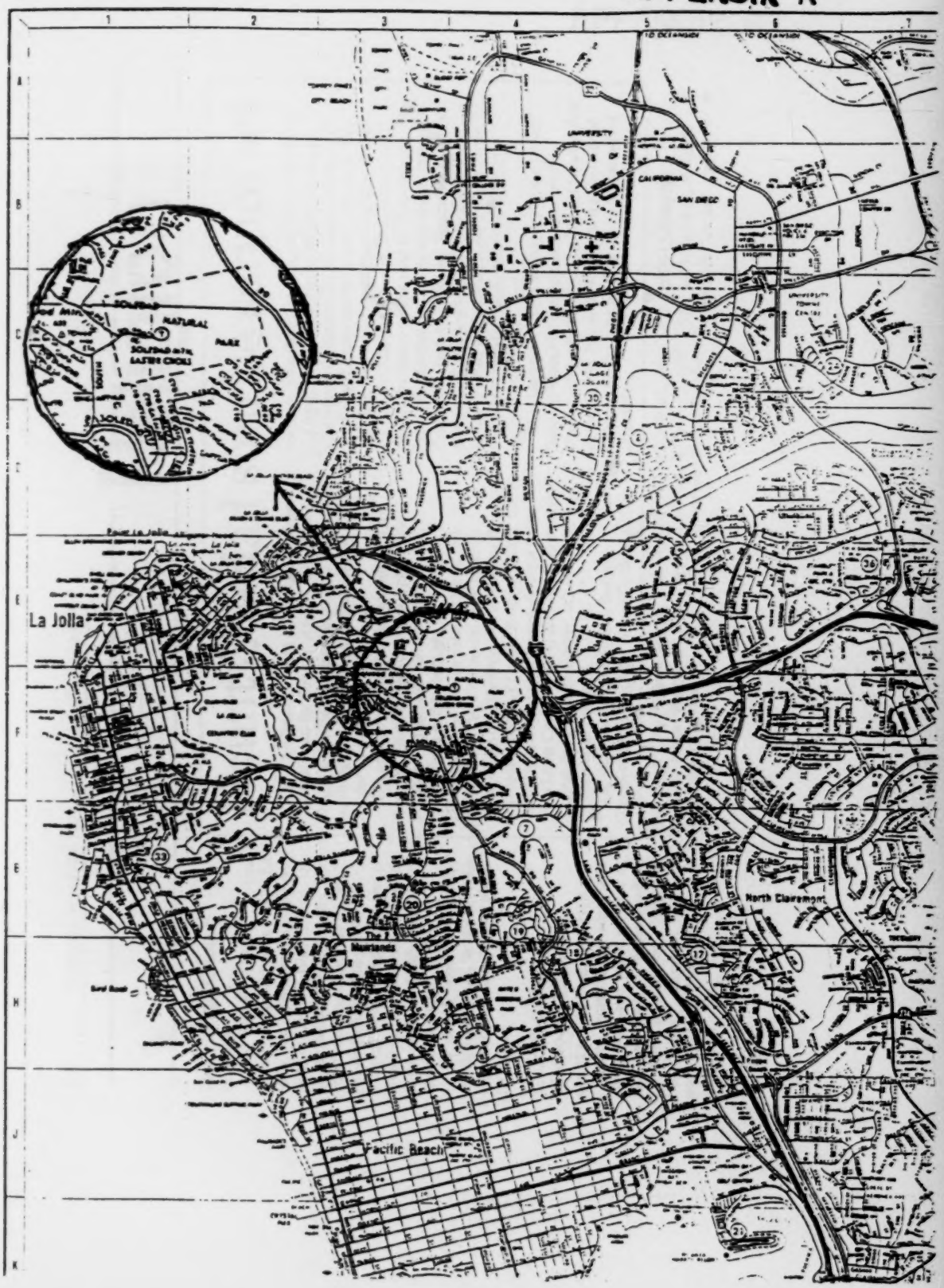
CONCLUSION

Petitioner has not demonstrated any persuasive reason for this Court to review the decision of the Court of Appeals. The decision below relied upon a substantial body of "interpretive caselaw" by California courts on the No Preference clause of the state constitution. There is no doubt that the Mt. Soledad Easter Cross shows a "preference" for the Christian religion. And there is no merit to petitioner's claim that the Easter Cross is protected by the "free speech" clause of the federal Constitution.

There is equally no merit to petitioner's claim that the district court and Court of Appeals should have abstained under the *Pullman* doctrine. California courts have provided ample guidance in cases that raise very similar factual issues, and federal courts have applied these rulings in similar cases.

In claiming that a denial of certiorari in this case would place the "historical treasures of this country . . . at risk of destruction," petitioner relies more on hyperbole and fantasy than on precedent and legal reasoning. Respondents respectfully urge this Court to deny the petition.

APPENDIX A



Religion

The Village Church
459-7456

The Village Church, a new church organization serving La Jolla, has commenced Sunday services at La Jolla High School. Dr. David Howle, pastor, presides. The church focuses on serving the area's growing single adult population.

David Howle holds a master of divinity and a doctorate of philosophy degree from Golden Gate Theological Seminary.

The church meets for Sunday worship at 11 a.m. in the La Jolla High School Cafeteria, 750 Nautilus St.

La Jolla United Methodist Church
6063 La Jolla Blvd., 454-7108

Easter Festival services with choir, brass and organ are held at 8:30 and 10 a.m. on Easter Sunday. Dr. Ritter preaches on "Eastering Our Deaths," based on Scripture readings from Mark 16:1-8 and Shall Reign" by Gilbert Martin. The Good News Singers are also featured at both services.

Mount Soledad sunrise service set

The 73rd Easter sunrise celebration at Mount Soledad is set for Sunday, April 3, 1994, at 6 a.m. Daylight-saving time goes into effect the same morning, and organizers urge participants to plan for the time change.

The service begins with the heralding of the dawn by Vincent Clarke, who has played his trombone for decades to begin this service.

Greetings will be brought by David Ish, representing the Mount Soledad Memorial Association. The 1954 poem dedication by Florence Scripps Kellogg will be read by her great grandson, Frederick Crowe Kellogg, and H. Bailey Gallison, who was an executive director of the La Jolla Town Council (1954) and was present at the original dedication ceremony, will share some of the memorial's history.

The Easter message will be a dialogue from the Gospel of Mark entitled "Ahead To Galilee" by the Rev. John Benbow, Congregational Church of La Jolla, and the Rev. Nancy Rupert McMaster, Clairemont Christian Church and president of the San Diego County Ecumenical Conference. The morning prayer will be given by the Rev. Brian Fairley, First Baptist Church of La Jolla. The Scripture lessons will be read by Peter Norris, University Lutheran Church, and Cmdr. John Corbett, St. James by-the-Sea Episcopal. Dan and Bonnie O'Keefe and the Sunshine Band, with special guests, will provide powerful and lively worship and praise music featuring colorful interpretive dance.

This annual service is sponsored by the Mount Soledad Memorial Association, a nonprofit organization, which is dedicated to the preservation of the park. A free will offering will gratefully be accepted for the continuing work of the memorial association.

on April 3 at 9 and 10:30 a.m. Music is provided by the Chancel Choir, soloists and Brass Ensemble.

La Jolla Lutheran
7111 La Jolla Blvd., 454-6459

Worship Service is Sunday at

APPENDIX B

000514

Mt. Soledad Memorial Association, Inc.

Officers and Trustees

Colonel Hugh Miller, President

William Scripps Kellogg, Vice President

Kenneth S. Walker, Treasurer

Mrs. Myrtle Hollelder, Secretary

Donald Campbell

Bradley Geist

Mrs. Frances Derr

Mrs. Izetta Jewel Miller

C. H. Rasmussen

C. L. Reasow

Dave Thompson

Mt. Soledad Memorial Cross Dedication

In reverent humility
We dedicate this Cross to Thee
O Christ. May it forever stand
A symbol in this pleasant land
of Thy great love and sacrifice
For all mankind. We lift our eyes
To this high Cross and reaffirm take
To do our best for Thy dear sake.

Ellen Scripps Kellogg

Easter Sunday, April 18, 1954

1:00 P.M.

La Jolla, California

APPENDIX C

Supreme Court, U.S.
FILED
OCT 6 1994
OFFICE OF THE CLERK

No. 93-2013

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

CITY OF SAN DIEGO,
Petitioner,

vs.

PHILIP K. PAULSON, HOWARD T. KREISNER
& SOCIETY OF SEPARATIONISTS, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals

PETITIONER'S REPLY MEMORANDUM

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No. 93-2013

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On Petition for a Writ of Certiorari to the United States Court of Appeals

PETITIONER'S REPLY MEMORANDUM

1. Factual Background

A. Veterans' Memorial

Respondents have not provided a complete factual summary. Petitioner agrees that the Memorial Cross was originally dedicated on Easter Sunday 1954 and that services have been held there on successive Easter Sundays. However, there were also military and veterans' groups present at the dedication and who continue to participate in ceremonies at Mt. Soledad honoring veterans of World Wars I, II, and Korea. Respondents include what allegedly is a page of a 1992 America Automobile Association map to illustrate that the Memorial Cross is characterized as the "Soledad Mountain Easter Cross." However, a 1994 Thomas Brothers Map of San Diego County, p. 1207, § J7 identifies the Cross as "The Mt. Soledad Memorial Cross." (Appendix A.) It is

irrelevant that one map identifies the Cross by one name, a different map by another. Neither is persuasive evidence of the nature of this Cross. The Memorial Cross was erected and dedicated as a war memorial, and continues to fulfill that function, regardless of how it is labeled.

B. Identifying Plaque

An identifying plaque was not put up at the time the Cross was erected because the Mt. Soledad Memorial Association, which built, owns, and maintains the Cross, did not have sufficient funds to do so. Through renewed citizen interest in membership in the Memorial Association as a result of this lawsuit, enough donations have been made to enable the Memorial Association to have a plaque made and attached to the fence surrounding the Memorial Cross. (Petition for Certiorari, hereinafter "P" -J)

C. Dedication as a War Memorial

This Memorial Cross is not an "Easter" Cross as Respondents would have the Court believe. Although the Cross was dedicated on Easter, the prominent part the veterans' groups played at the dedication, which is not a normal part of Easter services, makes it clear that the Cross is not an exclusively religious structure. It is important to remember the mentality and the tone of the U.S. in the 1950's when this Memorial Cross was dedicated.[1] At that time a cross

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[1] *See* 36 USC § 172, Pledge of Allegiance to the Flag. "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation *under God,* indivisible, with liberty and justice for all." (emphasis added.) The words "under God" were added June 14, 1954; *See also* 36 USC § 186, National Motto. "The national motto of the United States is hereby declared to be "In God we trust." *See Aronow v. United States,* 432 F.2d 242, 243 (Ninth Cir. 1970) "It is quite obvious that the national motto and the slogan on coinage and currency 'In God We Trust' has nothing whatsoever to do with the establishment of religion. Its use is of a patriotic or ceremonial

was a commonly accepted symbol of respect and commemoration of the sacrifices made by military veterans. In fact, as noted in the Petition for Writ of Certiorari, the American Battle Monuments Commission continues to mark veterans' final resting places with a cross. (Petition for Cert., H-2)

2. The Memorial Cross' Historical Designation

Respondents claim that Petitioner told the district court that the Cross was a war memorial, but has changed its argument and now characterizes the Cross as an "historical structure." (Brief in Opposition, hereinafter, "B" -3) In fact, Petitioner's argument continues to be that the Memorial Cross is an *historical* war memorial. At the time the district court heard the case, the Cross had not been designated an historical structure. The citizen campaign to have the Cross designated by the San Diego Historical Society began prior to the filing of Respondents' lawsuit. Obviously, Petitioner could not represent the Cross as a designated historical structure to the district court prior to designation. Respondents are obviously aware of the private citizen involvement with the City's Historical Site Board. (B-4) Repsondents' representation to this Court that the "City's attorneys provided assistance to the private citizens who prepared the request to the City's Historical Site Board" is unfounded and untrue.

Respondents also make the erroneous statement that the ownership of the Cross is irrelevant to the legality of its placement. A private citizen group built, maintains, and still owns the Cross. Private ownership is relevant because that fact shows that the City has not attempted to either establish or prefer one religion over another or any religion over none.

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character and bears no true resemblance to a governmental sponsorship of a religious exercise."

3. Summary of Argument

A. Questions Presented in Petition for Writ of Certiorari

Respondents seem to have missed the distinction between the Questions Presented in the Petition for Writ of Certiorari. The first question goes to the merits of the case and the second question is a procedural question relating to abstention. The primary authority on Supreme Court practice delineates some of the issues that are important when the Court is determining whether to grant certiorari. "On the Supreme Court rests the prime responsibility for the proper functioning of the federal judiciary. The grant of certiorari in cases involving federal jurisdiction, practice, and procedure reflects that responsibility . . . As the Court of last resort in the federal system, we have supervisory authority and therefore must occasionally perform a pure error-correcting function in federal litigation." Robert L. Stern, et al., *Supreme Court Practice* 191-92 (7th ed. 1993) (quoting *Florida v. Rodriquez*, 469 U.S. 1, 7 (1984) (Stevens, J., dissenting)).

Respondents argue that Petitioner has not satisfied the standards articulated in Supreme Court Rule 10.1(a)[2] It cannot be emphasized enough that federal courts should not decide important state questions — rather these issues should be decided by state courts. In an unusual move, the federal district court in this case, without prior notice to the

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[2]Supreme Court Rule 10.1(a) states in relevant part:

> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (a) When a United States court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

parties, based its decision solely on California law, when the parties had briefed and argued federal law almost exclusively. The Court of Appeals also based its decision on California law. This is precisely the type of situation for which Rule 10.1(a) was written in order that the Supreme Court might intercede and provide necessary guidance to lower federal courts. If the district court felt that California law was more relevant, it should have abstained and directed Plaintiffs to bring their case in state court. Since that did not happen, the Court of Appeals should have ordered abstention when the case came before it on appeal.

Respondents are in error when they state that California law is settled on the No Preference clause of the California Constitution.[3] Respondents state that the legality of a Memorial Cross on public property has been decided by the California courts. (B-6) This is undoubtedly a reference to *Fox v. City of Los Angeles*, 22 Cal.3d 792 (1978) in which, at specific times of the year, certain windows on City Hall in Los Angeles were lighted to form a cross. The only similarity between that case and this is that both refer to a cross-shaped display. This case concerns an historical Memorial Cross — a structure built, maintained, and owned by private citizens. It is not about a cross on, or near, the seat of government and with only religious connotations.

California law is not settled or clear enough on this issue to provide a clear indication as to how a California court would decide this case.[4] The relevant California cases refer to religious structures located either on or in government

---

[3]Article 1, section 4 of the California Constitution provides in relevant part: "Free exercise and enjoyment of religion without discrimination or preference are guaranteed . . ."

[4]*See Sands v. Morongo Unified School District*, 53 Cal.3d 863, 902 (1991), *cert. denied*, 112 S.Ct. 3026 (1992), and *Fox v. City of Los Angeles*, 22 Cal.3d 792 (1978) for discussion of the ambiguity of opinion of California cases on these issues. (P-18)

buildings. An in-depth discussion of California No Preference cases is found at P. 14-16.[5] Respondents' complaint that Petitioner did not discuss the California cases sufficiently is immaterial. The primary California cases (*Sands, Fox,* and *Okrand*) were not discussed in detail because they shed little or no light on how the California courts would handle the hybrid structure of this particular Historical/Memorial Cross.

B. *Allegheny County* Distinguished

Because this Court in *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989), discussed proximity to core government buildings, Respondents counter petitioner's declaration that the Soledad Memorial Cross is 13.5 miles from City Hall by providing a mileage figure that is four miles less than Petitioner's. (B-9) Whether the distance was 13.5 miles or 9.5 miles is not important. The important fact is that the Cross on Mt. Soledad cannot be seen from City Hall, nor can City Hall be seen from the Cross. There is no connection between the seat of government and the Cross such that an uninformed observer would think that the Cross is a symbol of any preference by the government for a particular religion or religion in general. In *Allegheny*, 492 U.S. at 599, Justice Blackmun stated that a creche could not be allowed to remain because in the county courthouse it "sits on the Grand Staircase, the 'main' and 'most beautiful part' of the building that is the seat of county government." The Memorial Cross is miles from the seat of City government, and therefore should not suffer the same fate as the creche in *Allegheny*.

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[5]*See Sands v. Morongo Unified School District*, 53 Cal.3d 863 (1991), *cert. denied*, 112 S.Ct. 3026 (1993); *Fox v. City of Los Angeles*, 22 Cal.3d 792 (1978); *Okrand v. City of Los Angeles*, 207 Cal.App.3d 566 (1989); *Hewitt v. Joiner*, 940 F.2d 1561 (9th Cir. 1991), *cert. denied* 112 S.Ct. 969 (1992).

C. Abstention Argument

Respondents apparently feel that historic structures not to their liking are not deserving of preservation. They ridicule the seriousness with which Petitioner and Amicus, The Attorney General of California, treat the subject of California's Historical artifacts and structures. ("Disaster impends.") (B-10-11) It is imperative that states be allowed to interpret their own laws and constitutions in order to preserve their own unique history, structures, and artifacts. For example, the names of several cities and some of the early buildings (whether former bordellos, churches, or synagogues) in California may not be important to the citizens of other states. Likewise, the historical artifacts and structures of other states may not be important to the citizens of California. That is precisely the reason why federal courts should abstain from interpreting state laws and state constitutions where the law is unsettled. The federal courts do not have the knowledge, the expertise, or the interest in local history that state courts have and that is necessary to provide an appropriate opinion.

Respondents cite the opinion of *Hewitt v. Joiner*, 940 F.2d 1561 (9th Cir. 1991), *cert. denied* 112 S.Ct. 969 (1992) for its analysis of the *Fox* and *Okrand* opinions. They attempt to somehow apply the appellate court's analysis in *Hewitt* to the facts of this case. That analysis is, of course, irrelevant to this case because *Hewitt* involved religious statues in a park that was endorsed by government. The subject of this case is a privately owned, designated historical war memorial. *Hewitt v. Joiner* should not be interpreted as precedential to this case.

California courts, not the federal courts, should interpret the language of the California Constitution, particularly where state law is not clear and there is no guidance from any state case on how the instant case would be decided. The Mt. Soledad Memorial Cross creates a case of first

impression and is not analogous to *Fox, Okrand, Hewitt v. Joiner*, or *Sands*, but rather requires independent analysis by state courts.

CONCLUSION

1. The Memorial Cross does not violate the California or the Federal Constitutions.

Petitioner respectfully requests this Court to grant certiorari and to find that the Mt. Soledad Memorial Cross violates neither the California No Preference Clause nor the Federal Establishment Clause. Preservation of valuable historical artifacts and structures is too important to be the subject of arguments over which court has jurisdiction. This case provides the Court with the opportunity to give notice that federal and state historical objects deserve preservation.

Absent a mandate from this Court, historical objects and structures may be at risk of loss or destruction. They must not be subjected to the vagaries of legal arguments, politics, or semantics. Nor should they be allowed to become the victims of persons or groups who oppose the history or background of any particular historical object. Petitioner respectfully requests this Court not be distracted by complaints that certain historical structures are offensive to some people, but rather keep the importance of historical preservation as a first priority.

Therefore, Petitioner respectfully requests this Court to grant certiorari, reverse the court of appeals and find that the historical Mt. Soledad Memorial Cross violates neither the California nor federal constitutions.

2. In the Alternative, Abstention is Requested.

If this Court does not find that the Memorial Cross passes constitutional muster, Petitioner would raise the important

states' rights issue that states should have jurisdiction over state issues; in this case, historical artifacts and structures. Petitioner would ask this Court to follow the guidelines of Rule 10.1(a) and remind lower federal courts that states must be allowed to interpret their own constitutions. If a federal court decides a state issue where state law is unsettled, then that state is deprived of the right to interpret its own law and set precedent for its own courts. The federal courts have imposed upon a fundamental right of the states.

Petitioner respectfully requests this Court to grant certiorari and order this case to be heard in the state courts.

APPENDIX A

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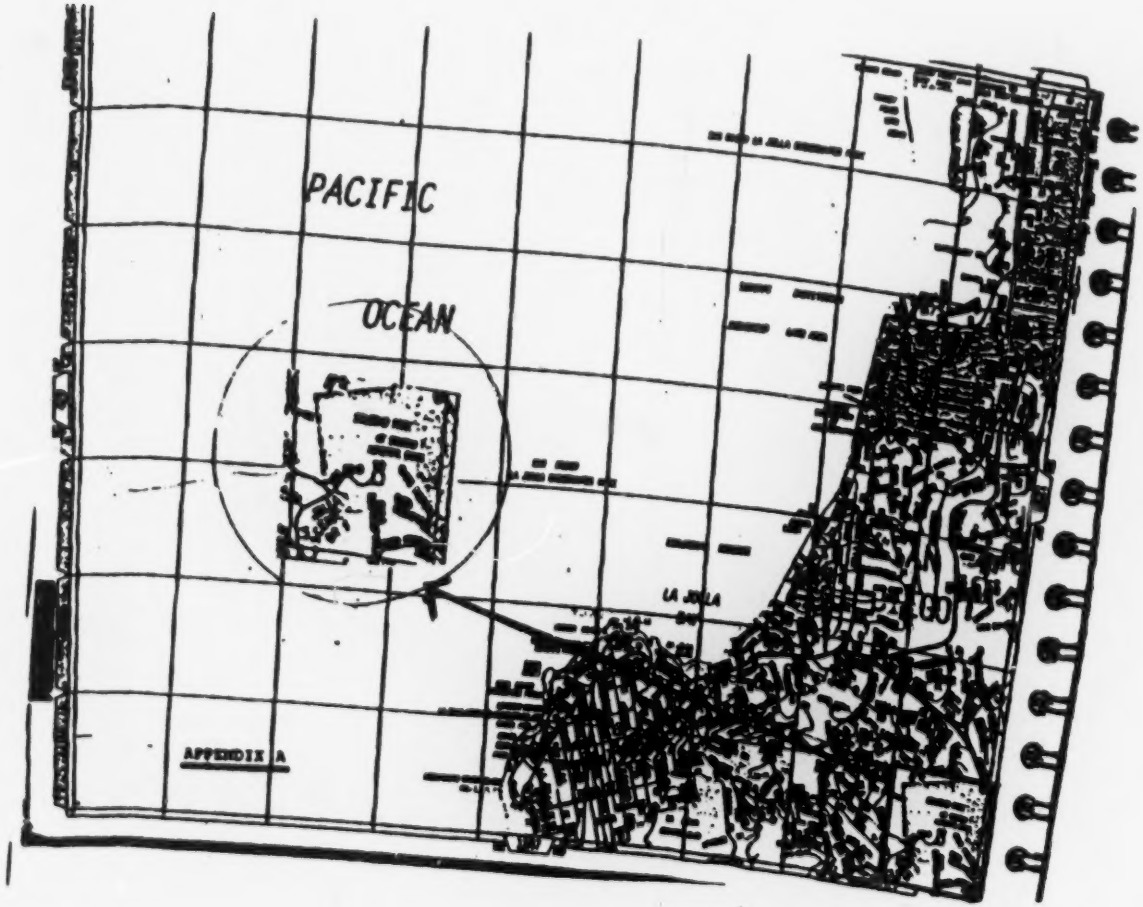
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